Southern Mail, Inc., et al, a Single Employer and American Postal Workers Union, AFL-CIO. Cases 16-CA-20760-2, 16-CA-20779, 16-CA-20958, 16-CA-20996(1-2), 16-CA-21014, 16-CA-21041, 16-CA-21078

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 6, 2002, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed answering briefs, and the Respondent filed reply briefs. The Charging Party filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order and notice as modified.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the contentions are without merit.

[2] We have modified the remedy, Order, and notice to more accurately reflect the violations found and the usual remedial provisions of the Board.

Also, we shall delete from the recommended Order and notice the requirement that the bargaining period be extended for 12 months under *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962). Under *Mar-Jac*, the Board may extend the 1-year certification period to compensate for the failure of an employer to bargain in good faith during that time period. Here, as more fully explained below, the Respondent, during the certification year, made several unlawful unilateral changes and refused to furnish requested relevant information. However, neither the General Counsel nor the Charging Party contends that the Respondent has failed or refused to recognize the Union or to meet and bargain with the Union in good faith following the Union's certification, nor do either of them contend that the Respondent's violations of Sec. 8(a)(5) have tainted negotiations during the certification year. Under these circumstances, we will remove the *Mar-Jac* remedy from the recommended Order. See *Visiting Nurse Services of Western Mass.*, 325 NLRB 1125, 1132 (1998), enfd. 177 F.3d 52 (1st Cir. 1999), cert. denied 528 U.S. 1074 (2000).

Introduction

The Respondent, a contract mail carrier for the United States Postal Service (USPS) primarily engaged in over the road transportation, consists of six related companies operating as a single employer: Southern Mail Services, Alamo Mail Services, Byrd Trucking, S&B Stagelines, H&L Mail, and E&L Mail. The Union's efforts to organize certain of the Respondent's employees commenced in May 2000.[3] On August 31, the Union won a mail ballot election in a unit of approximately 300 drivers "assigned, stationed or dispatched" from terminals in Dallas, Houston, and San Antonio, Texas. The Union was certified as the exclusive bargaining representative of the drivers on September 8.

In his decision, the judge found that the Respondent committed a number of unfair labor practices before and after the election. As set forth below, we affirm in part and reverse in part the judge's unfair labor practice findings. We address these matters in turn.

Discussion

1. The judge found, and we agree, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(1) by:

- Supervisor John Pool threatening employee Frank Cruz with loss of employment or sale of the company if the Union won the election;
- Supervisor Pool threatening employees Ron Dakin and Rudolfo Sanchez with loss of seniority if the Union won the election;
- Supervisor James McMullen threatening to transfer unit employee Lenorah Antoine to a nonunion company;[4]
- Safety Manager Bill Sturdivant coercively interrogating employee Howard Cranford about the Union;[5] and
- Supervisor James Reilly harassing employee Fern Clark with threats of discipline and ter-

The General Counsel filed a motion to strike portions of the Respondent's Brief in Support of its Exceptions. We grant the General Counsel's motion to strike inasmuch as the references were to documents and testimony which were not admitted into evidence at the hearing and are not, therefore, part of the record in this proceeding. See *Electro-Tec, Inc.*, 310 NLRB 131 fn.1 (1993), enfd. 993 F.2d 1547 (6th Cir. 1993); *Today's Man*, 263 NLRB 332, 333 (1982).

[3] All dates are in 2000 unless otherwise indicated.

[4] We do not adopt any implication in the judge's decision that McMullen threatened Antoine with transfer to a lower paying job.

[5] In adopting the judge's finding, we find it unnecessary to pass on the other interrogation findings made by the judge because the findings of additional unlawful interrogations would be cumulative and would not materially affect the remedy for this unlawful conduct.

mination and denying her union representation during an investigatory interview.

We also adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by:

- Discharging employees John Pinkston and Bobby Marks;[6]
- Transferring employees Cruz and Richard Paiz to lowering paying routes; and
- Disciplining and suspending employee Clark.[7]

We also adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) by:

- Unilaterally altering the Nuevo Laredo run;[8]
- Unilaterally altering its policy regarding drivers correcting their timecards and DOT logs;
- Unilaterally altering its drug testing policy; and
- Failing to provide the Union with information requested on October 5, 2000[9] and March 12, 2001.[10]

We further agree, for the reasons set forth in his decision, with the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by transferring bargaining unit work to Leeway Transportation.

2. The judge found that the Respondent violated Section 8(a)(5), (3) and (1) by changing its DOT log disciplinary policy. In light of the conclusion that the change in log policy was unlawful, the judge found that the Respondent violated Section 8(a)(3) and (1) by discharging drivers Howard Cranford and Clyde Evans for DOT log violations. For the reasons that follow, we affirm these findings.

As a contract mail carrier, the Respondent is subject to Department of Transportation (DOT) regulations that limit the working and driving hours of covered drivers. Specifically, the DOT regulations prohibit a driver from driving more than 10 hours without an 8 hour break, and more than 70 hours in 8 consecutive days.[11] The regulations also require drivers to maintain a log which records their starting times, miles driven, duty status, break times, and other information.[12] The regulations do not specify any disciplinary measures that an employer must take against drivers who fail to comply.

Until January 2001, the Respondent was relatively lenient in its approach to its drivers' compliance with DOT regulations and even helped its drivers circumvent the regulations. The Respondent's vice president of human resources, James Reilly, testified that drivers who violated DOT regulations would speak with Safety Manager Sturdivant and not be subject to other discipline. In fact, from 1997 until January 31, 2001, only 3 of over 130 terminations were for violations of DOT log regulations.

Cranford testified that he was told to falsify his logs by his terminal manager in December 1999 to avoid showing a DOT violation for driving more than 70 hours in 8 consecutive days. Cranford also testified that he was instructed by his supervisor in January 2000 to falsify his log to avoid revealing another DOT 70 hour rule violation

Evans did not receive instruction on DOT log maintenance and compliance when he was hired in August 2000. In September, the Respondent instructed him to make a run from Dallas to Amarillo without a required 8-

[6] In adopting the judge's finding that the Respondent unlawfully discharged Pinkston and Marks, we rely on the employees' open display of Union insignia in the workplace to establish the Respondent's knowledge of their union activity. We find it unnecessary to rely on the judge's finding that the Respondent's knowledge of the employees' union activities could be inferred from their authorization card signings, their active solicitation of other employees to sign cards, their distribution of union literature, and the Union's margin of victory.

[7] In adopting the judge's finding, we rely on Clark's role as a union negotiator, as well as Clark's invocation of her *Weingarten* rights to establish the Respondent's knowledge of Clark's union activities. We do not rely on the judge's discussion of Clark's preelection union activity to establish the Respondent's knowledge.

[8] In adopting the judge's finding, we note that the Respondent was required by the USPS to change the schedule for the Nuevo Laredo run and remove two stops. However, the Respondent was not required by the USPS to add an additional 100 miles to the run. Instead, the decision to add the miles to the run was made solely by the Respondent without bargaining with the Union. Our finding of a violation of Sec. 8(a)(5) is limited to this discretionary change.

Member Liebman would not so limit the violation. In her view, while the Respondent is certainly free to take the position in bargaining that it is required to make certain changes in the Nuevo Laredo run because of its relationship with USPS, there is no basis for excusing the Respondent from its obligation to notify the Union and give it an opportunity to bargain over all the changes, even those that the Respondent asserts were mandated by the USPS. Thus, in her view, all aspects of the Nuevo Laredo run changes should be included as part of the 8(a)(5) violation.

[9] We note that the Respondent's obligation to provide information in this request is limited only to presumptively relevant information about bargaining unit employees. We shall leave to the compliance stage of this proceeding the determination of the precise information in this request which the Respondent must furnish. See *WCCO Radio, Inc.*, 282 NLRB 1199 fn. 3 (1987), enfd. 844 F.2d 511 (8th Cir. 1988), cert. denied 488 U.S. 824 (1988).

[10] Specifically, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide the Union with the phone numbers and employment status of bargaining unit employees.

We also adopt the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by failing to supply the Union with the social security numbers of bargaining unit employees.

[11] See 49 C.F.R. § 395.3.

[12] See 49 C.F.R. § 395.8.

hour break when he stated he could not complete the run with the break for personal reasons. Evans consistently had trouble filling out his log, and dispatcher Valdez routinely calculated his hours and filled in the "recap" section of the log showing whether he had exceeded his maximum allowable hours. Evans was not disciplined for these infractions. Rather, he was required to watch a training film after which Valdez helped him update his log.

According to the Respondent's records, Evans failed to take the DOT-required break during a run on January 9, 2001. Safety Manager Sturdivant called him to discuss the infraction on January 30, 2001, and Evans explained that he failed to take the required break because he had to return home for a family emergency. Sturdivant told Evans that he was going to issue him a warning letter, which stated, among other things: "It is our wish that this written warning will correct a serious deficiency and that no further corrective action up to and including dismissal will be necessary." One day earlier, the Respondent had placed Cranford on off-duty status because there was a problem with his logs.

On January 31, Union bargaining committee members Boston and Vaughn met with the Respondent to discuss rumors that drivers had been discharged for DOT violations. The Respondent responded that drivers had been suspended, but denied that any drivers had been discharged.

However, on February 1, the Respondent discharged Cranford, Evans, and driver Rudy Cates for DOT log violations.[13] Immediately after the discharges, the Respondent issued a memo from its owner, Tish Farrell, to its drivers blaming the Union for the terminations. The memo stated, in pertinent part, "[s]everal drivers are upset and have asked about the termination of several long term drivers. I wanted you to hear directly from me the cause of those terminations. Two members of the APWU Bargaining Committee quite properly brought to the Company's attention that certain drivers were falsifying their DOT logs."

As the judge found, the Respondent's changes to its DOT log disciplinary policy violated Section 8(a)(5) and (1). Mandatory subjects of bargaining include the circumstances in which discipline will be imposed for violations of employer policies. See *Pepsi-Cola Bottling Co. of Fayetteville, Inc*., 330 NLRB 900, 904 (2000), enfd. in relevant part 24 Fed.Appx. 104 (4th Cir. 2001), citing *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enfd. 71 F.3d 1434 (9th Cir. 1995). The record clearly shows that the Respondent's DOT log disciplinary policy changed from virtual nonenforcement to strict enforcement in early 2001. It is undisputed that the parties were engaged in negotiations for a collective-bargaining agreement, that they had not reached overall impasse, and that no exception to the overall impasse rule applied. Accordingly, the change violated Section 8(a)(5) and (1). See, e.g., *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc., v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

We also find that the change violated Section 8(a)(3) and (1). To establish a violation of Section 8(a)(3) under *Wright Line*,[14] the General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in the Respondent's decision to more strictly enforce its DOT log disciplinary policy. Once this is established, the burden shifts to the Respondent to demonstrate that such actions would have taken place for a legitimate reason regardless of the protected activities.

Like the judge, we find that the General Counsel has met his initial burden. There is abundant evidence of the Respondent's motivation to retaliate against employees for their election of a union bargaining representative. The Respondent repeatedly threatened its drivers with adverse consequences if the Union won the election.[15] Immediately after the election, it deviated from past practice and discriminatorily discharged union supporters Pinkston and Marks for alleged timecard violations. In late October, the Respondent threatened to transfer employee bargaining unit member Lenorah Antoine to a non-bargaining unit job. In early November, it discriminatorily transferred drivers Cruz and Paiz to lower paying routes. Later that same month, the Respondent coercively interrogated Cranford as to whether the Union had turned the Respondent in to the DOT. The Respondent's abrupt change in its DOT log disciplinary policy at the end of January 2001 was consistent with this continuum of unfair labor practices. The Respondent's unlawful motivation is further demonstrated by the change in Evans' discipline from warning to discharge and by owner Farrell's attempt to place the Union in disrepute with the drivers by falsely claiming that the Union had "brought to the Company's attention that certain drivers were falsifying their DOT logs."

We also find that the Respondent failed to show that it would have more strictly enforced its DOT log discipli-

[13] There is no unfair labor practice allegation relating to the discharge of Cates.

[14] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[15] These threats included loss of employment, sale of the company, and loss of seniority if the Union won the election.

nary policy even in the absence of its drivers' union activity. We do not question the legitimacy of an employer's need to comply with Federal regulations in its industry. The regulations and Respondent's compliance with them are not at issue here. The issue concerns how the Respondent dealt with drivers who fail to comply with its regulations. The record shows that the Respondent felt no need to discipline drivers for failing to comply with DOT regulations until after they chose to be represented by the Union. The Respondent offers no explanation for the change in its disciplinary policy. Instead, the Respondent asserts that *there was no change* in policy. On the contrary, until the discharges at issue, the Respondent's disciplinary policy with respect to DOT log violations was lax or nonexistent. It was long aware of log falsifications by Cranford and Evans and tolerated them until it could seize upon these infractions in an unjustified effort to blame the Union for the discharges. Accordingly, we find the Respondent has failed to prove that it would have changed its DOT log disciplinary policy in the absence of its drivers' union activity.[16]

The Respondent's unlawful change in its disciplinary policy for DOT log violations in response to employees' union activities discriminated against all of its employees. Thus, the discharges of Cranford and Evans violated Section 8(a)(3) and (1) of the Act even if Respondent was unaware of union activity by these specific individuals and even if Respondent had no particular unlawful motive against specific employees. E.g., *Treanor Moving & Storage Co.*, 311 NLRB 371(1993).[17]

3. The judge found, and we agree for the reasons set forth below, that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over changes to the Dallas to Denver run. As more fully set forth in the judge's decision, the Respondent notified the Union on September 29 that the USPS was changing the schedule for the Dallas to Denver run on October 14. The Respondent offered to bargain over the changes. The parties met on October 5, and the Union requested information for the purpose of bargaining.

On October 6, the Respondent notified the Union by letter that it had determined that the best way to operate the new run was to run it out of Amarillo, Texas instead of Springfield, Colorado and that any Springfield or Dallas driver wishing to relocate to Amarillo should notify the Respondent by October 10. The Respondent also provided the Union with some of the information requested the previous day, including the trip schedules and the names of the affected drivers. However, the Respondent did not provide the requested copy of the USPS change order, an explanation of its reasons for the switch to Amarillo and the elimination of the Springfield run, or any details about stops on the changed run schedule. On the same day, the Union protested the Respondent's decision to move ahead without negotiations and reiterated that it needed the remaining requested information in order to bargain.

On October 10, the Union again requested the balance of the information and proposed that the Respondent maintain the status quo. On October 11, the Respondent informed the Union that it could not honor its request to maintain the status quo. On October 13, the Respondent provided the Union with the rest of the requested information except for the USPS change order. On October

[16] Accord *Hialeah Hospital*, 343 NLRB No. 52 at slip op. 2-3 (2004)(respondent failed to meet *Wright Line* rebuttal burden of establishing that it would have more strictly enforced departmental regulations in union's absence by referring only to the regulation itself, which was not enforced prior to the union's advent).

[17] Under these circumstances, we do not rely on the judge's finding that the Respondent was aware of Evans' support for the Union. On the other hand, there is direct credited evidence that the Respondent knew of Cranford's union activity and questioned him about the Union's involvement with DOT.

Member Schaumber agrees with his colleagues that the decision to change the DOT log disciplinary policy was a bargainable matter, and that the unilateral action taken by the Respondent was unlawful under Sec. 8(a)(5) and (1).

Member Schaumber, however, disagrees with the majority's finding that the Respondent's change in its disciplinary policy for DOT log violations was discriminatorily motivated in violation of Sec. 8(a)(3) and (1). In his view, the Respondent had a compelling need to ensure that its drivers comply with applicable DOT regulations and safely operate the Respondent's trucks. The Respondent may have enforced those rules more stringently in January 2001 than it had in the past, but this more stringent enforcement was motivated by these compliance and safety needs. It was not shown to be a response to the employees' decision to vote for union representation 5 months earlier.

Accordingly, Member Schaumber does not agree with his colleagues that the discharges of Evans and Cranford can be found to violate Sec. 8(a)(3) because they were pursuant to the Respondent's disciplinary policy for DOT log violations.

As to Cranford, Member Schaumber agrees with his colleagues that his discharge was unlawful, but he does so for the reasons stated by the judge. Thus, he agrees with the judge that the General Counsel carried his *Wright Line* burden to prove that Cranford's union activity was a motivating factor in the Respondent's decision to discharge him. The record shows that Cranford engaged in union activity and that the Respondent was aware of this activity. The Respondent's antiunion animus is clear from the numerous 8(a)(5), (3), and (1) violations discussed above. Finally, he finds, in agreement with the judge, that the Respondent failed to show that it would have taken the same action in the absence of Cranford's union activity.

As to Evans, however, Member Schaumber finds that the General Counsel failed to show that the Respondent's antiunion animus was a substantial or motivating factor in its decision to discharge him. This is because he finds there is simply no evidence that the Respondent knew Evans signed an authorization card, his only union activity. Moreover, Evans was discharged in February 2001, more than 5 months after he signed the card.

14, the Respondent implemented the changes to the Dallas to Denver run.

For the reasons stated by the judge in his decision, we find that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to timely furnish the Union with requested information concerning the proposed change to the Dallas to Denver run. The Union has demonstrated that it needed the requested information in order to engage in meaningful bargaining with the Respondent regarding the change. The information requested by the Union related directly to the terms and conditions of employment for bargaining unit employees. As such, it was presumptively relevant to the Union's representative role. See, e.g., *Beverly Health Care & Rehabilitation Services*, 328 NLRB 885 (1999).

In light of the Respondent's unlawful failure to provide this information which the Union needed to engage in meaningful bargaining, we further find that the subsequent unilateral change to the run also violated Section 8(a)(5) and (1). We reject the Respondent's contention that it could not bargain about the change to the Dallas to Denver run because it was mandated by the USPS. The change order issued by the USPS required the Respondent to change the start and end times of four runs, thereby reducing each run's total travel time. The USPS did not require any of the other changes implemented by the Respondent, including the decision to change the starting point from Springfield to Amarillo. Instead, the USPS left those decisions to the Respondent's discretion. By unilaterally implementing these changes in the circumstances set forth above, the Respondent violated Section 8(a)(5) and (1) of the Act.[18]

4. Contrary to the judge, we find that the Respondent did not unlawfully threaten employee Ron Dakin on September 15. As more fully set forth in the judge's decision, Dakin testified that while he was in the office picking up timecards, Supervisor John Pool asked him how the Union was coming along. Pool told Dakin that the Respondent's owner, Tish Farrell, was considering cutting the drivers' runs to 40 hours a week. Dakin asked why and Pool replied that Farrell told him that if the Union got a contract that called for time-and-a-half pay over 40 hours she was not going to want to pay the extra money and therefore was thinking of cutting runs back to 40 hours a week. Dakin was an open union supporter who discussed union bargaining positions with Pool prior to the election. He testified that Pool was referring to proposals that might be made during contract negotiations.

The judge found that Pool's statement was a threat of loss of pay in violation of Section 8(a)(1). We disagree. Viewed in context, the statement was not a threat of reprisal for employees' support of the Union, but was instead, a lawful discussion of possible contract proposals. Indeed, Dakin acknowledged in his testimony that Pool's statement was a reference to proposals the parties might exchange.[19] In these circumstances, there is simply no basis on which to conclude that Dakin would reasonably view Pool's statement as a threat to reduce hours worked by employees as retaliation for their support for the Union.[20]

5. We also reverse the judge's finding that the Respondent violated Sections 8(a)(3) and (1) by reducing employee Julio Gomez's work schedule by one day. As more fully discussed in the judge's decision, on February 7, 2001, Gomez was asked by Supervisor John Pool to make a run because another driver was going on vacation. Gomez protested to Pool and terminal manager Richard Romero that if he worked as requested he would violate the DOT regulation prohibiting drivers from exceeding 70 hours in an 8 day period, but eventually worked as scheduled.

On February 11, 2001, Gomez again refused to run the routes assigned to him because he believed he would violate DOT regulations if he did. Gomez then told Romero that he was going to call DOT, not to report the Respondent, but to see if he had enough hours to work. Romero angrily told Gomez to take the whole week off,

[18] To the extent that her colleagues are limiting the 8(a)(5) violation here to the changes *not* required by the USPS, Member Liebman disagrees. As noted above with respect to the changes in the Nuevo Laredo run (fn. 8, supra), she sees no basis to excuse the Respondent from the duty to notify the Union and afford an opportunity to bargain about *all* changes in connection with the Dallas to Denver run, including the reduction in total run time required by the USPS.

[19] We rely on Dakin's statement as objective evidence of the context in which Pool discussed a possible reduction in hours, not as subjective evidence that Dakin did not feel threatened.

[20] Member Liebman would find that Supervisor Pool did threaten employee Dakin on September 15. The majority's reasoning that Pool was merely discussing "possible contract proposals" with Dakin is belied by Pool's actual statement that *if the union got a contract* requiring time-and-a-half for overtime, Respondent's owner, Tish Farrell, was thinking of cutting runs back to 40 hours a week. That statement reasonably conveys the meaning that if the Union were to succeed in negotiating time-and-a-half for overtime, Farrell might unilaterally eliminate overtime. It is besides the point how Dakin construed Pool's words. The test under Sec. 8(a)(1) is an objective one and depends on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). The test is met here, regardless of Dakin's subjective construction of Pool's threatening comment. See *Cooper Tire & Rubber Co. v. NLRB*, Case Nos. 04-1425, 04-1590 (6th Cir. Aug. 24, 2005) (stating that test to be applied is whether remark can reasonably be interpreted by employee as a threat, not whether employee was in fact intimidated or coerced).

and that he would call Gomez if his services were needed again.

The next day, after a conversation with fellow employee Dakin, Gomez contacted Safety Manager Bill Sturdivant who verified Gomez's concern that he would run over his hours if he followed Romero's instructions. Sturdivant proceeded to tell Gomez that he could return to work the following day, February 13, 2001. Gomez returned to work and on February 15, 2001, Respondent removed 1 day from his 5 day a week schedule.

The judge found that the Respondent violated Section 8(a)(3) and (1) by reducing Gomez's schedule by 1 day. We do not agree with this finding.

As noted above, to establish a violation of Section 8(a)(3) under *Wright Line*,[21] the General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in the Respondent's decision to reduce Gomez's hours. Once this is established, the burden shifts to the Respondent to demonstrate that such action would have taken place for a legitimate reason regardless of the protected activities.

The record evidence shows general antiunion animus on the part of the Respondent. However, the General Counsel has failed to show that the Respondent's antiunion animus was a motivating factor in the decision to reduce Gomez's hours. The only union activity Gomez engaged in was attending union meetings prior to the election. Importantly, the Respondent reduced Gomez's hours in February 2001, more than 5 months after his union activity, which was relatively insignificant. Nor is there any clear evidence that the Respondent knew of this activity.[22] In these circumstances, we find that the General Counsel failed to show that Gomez's union activity was a motivating factor in the decision to reduce his hours. Therefore, we shall dismiss this complaint allegation.[23]

[21] 251 NLRB 1083, supra.

[22] The judge found that supervisor Pool once observed Gomez speaking with Dakin and a union representative in a store used by the Union for meetings with employees. Without more, this evidence does little to establish that the Respondent had knowledge of union activity on Gomez's part.

[23] While the Respondent's brief argues for reversal of the judge's finding of a violation only on credibility grounds, its exceptions specifically contest the judge's finding that Gomez's union activity was a motivating factor in the decision to reduce his hours and the finding that the Respondent failed to show that it would have taken this action in the absence of those activities. In these circumstances, we are satisfied that the issue is properly before us.

Although the General Counsel alleged that Gomez's reduction in hours was also an independent violation of Sec. 8(a)(1), there is no evidence that the Respondent knew of any concerted activity on the part of Gomez. Therefore, we shall also dismiss the Sec. 8(a)(1) complaint allegation.

AMENDED CONCLUSIONS OF LAW

1. Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Services., Inc., E&L Mail, Inc., and H&L Mail, Inc. constitute a single employer (Respondent).

2. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by:

(a) Supervisor John Pool threatening employee Frank Cruz with loss of employment or sale of the company if the Union won the election.

(b) Supervisor John Pool threatening employees Ron Dakin and Rudolfo Sanchez with loss of seniority if the Union won the election.

(c) Supervisor James McMullen threatening to transfer unit employee Lenorah Antoine to a nonunit company.

(d) Safety Manager Bill Sturdivant coercively interrogating employee Howard Cranford about the Union.

(e) Supervisor James Reilly harassing employee Fern Clark with threats of discipline and termination and denying her union representation during an investigatory interview.

5. Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Discharging employees John Pinkston, Bobby Marks, Howard Cranford and Clyde Evans.

(b) Transferring employees Frank Cruz and Richard Paiz to lower paying routes.

(c) Disciplining and suspending employee Fern Clark.

Member Liebman would adopt the judge's finding that the Respondent's decision to reduce Gomez's hours violated Sec. 8(a)(3). The Respondent's argument in opposition to that finding is limited to challenging the judge's decision to credit Gomez, and the majority does not reverse the judge's decision in that regard. The majority nevertheless finds that the General Counsel failed to show that union animus motivated the decision to reduce Gomez's hours, in part because of a purported absence of evidence that the Respondent knew of Gomez's union activity. Contrary to the majority's finding, the evidence does support a finding of knowledge, as it shows that Gomez attended 10 or 11 union meetings, and supervisor Pool saw him at one of these meetings. Member Liebman would find that issue not properly before the Board. In her view, the Respondent waived all arguments with respect to the Sec. 8(a)(3) finding concerning Gomez—and also with respect to the independent Sec. 8(a)(1) finding, which the majority also dismisses—except its contention that Gomez should not have been credited. The majority considers the Respondent's unargued exceptions sufficient to permit them to reach and reverse the judge's findings concerning Gomez. Member Liebman disagrees. See *Tri-Tech Services, Inc.*, 340 NLRB No. 97, slip op. at 3 fn. 11 (2003) (Member Liebman, dissenting in part) (finding unargued exceptions thereby waived). Having waived all exceptions to the judge's findings concerning Gomez except for credibility, nothing is left but to adopt the judge's findings, and Member Liebman would do so.

(d) Unilaterally altering its disciplinary policy regarding Department of Transportation (DOT) logs.

6. Respondent violated Section 8(a)(5) and (1) of the Act by:

(a) Failing to bargain over changes to the Dallas to Denver run.

(b) Unilaterally altering the Nuevo Laredo run.

(c) Unilaterally altering its policy regarding drivers correcting their timecards and DOT logs.

(d) Unilaterally altering its disciplinary policy regarding DOT logs.

(e) Unilaterally altering its drug testing policy.

(f) Failing to furnish presumptively relevant information requested by the Union in its October 5, 2000 and March 12, 2001 letters to the Respondent.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent has not violated the Act in any other manner except as specifically found herein.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be ordered to make whole John Pinkston, Bobby Marks, Howard Cranford, Clyde Evans, and Fern Clark in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1172 (1987).[24] To the extent, if any, that the Respondent's unlawful conduct resulted in employees receiving less than they would have been entitled to for their work had the Act not been violated, the Respondent shall be ordered to make those employees whole in the manner set forth in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 197*1)*, with interest as prescribed in *New Horizons for the Retarded*, supra.

[24] We shall delete from the judge's recommended remedy a provision that discriminatees be reimbursed for extra taxes resulting from lump sum payment of the backpay award due them. Such remedial relief is inconsistent with current precedent. See *Hendrickson Bros., Inc.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985); *Laborers Local 282 (Austin Co.)*, 271 NLRB 878 (1984). In *Hotel Employees and Restaurant Employees International Union, Local 26 (HERE)*, 344 NLRB No. 70 (2005), the majority granted the General Counsel's motion to withdraw its request for similar tax relief. As explained in her dissent in the *HERE* case, Member Liebman remains of the view that the Board should overrule this precedent and provide tax compensation as part of its make-whole remedy. She acknowledges, however, that such a remedy is not available under current Board law, and therefore she concurs in deleting that remedy from the judge's proposed remedy.

Having found that the Respondent violated the Act by failing to provide information requested by the Union on October 5, 2000, we shall order the Respondent to furnish the Union with the information from the request concerning bargaining unit employees determined to be presumptively relevant at the compliance stage of this proceeding.

In addition, to remedy the Respondent's failure to provide information requested by the Union on March 12, 2001, we shall order the Respondent to only furnish the Union with the phone numbers and employment status of bargaining unit employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Service, Inc., E&L Mail, Inc., and H&L Mail, Inc., a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with loss of employment or sale of the company because of their union or other protected concerted activity.

(b) Threatening its employees with loss of seniority because of their union or other protected concerted activity.

(c) Threatening its employees with transfer to a nonunit company because of their union or other protected concerted activity.

(d) Coercively interrogating any employees about their union support or union activities.

(e) Harassing its employees by threatening them with discipline and termination because of their union or other protected concerted activity.

(f) Denying its employees union representation during interviews when disciplinary action may result.

(g) Discharging or otherwise discriminating against any employees for supporting the Union or any other labor organization.

(h) Transferring its employees to lower paying routes for supporting the Union or any other labor organization.

(i) Disciplining and suspending its employees for supporting the Union or any other labor organization.

(j) Unilaterally making changes in its employees' wages, hours, working conditions, or other conditions of employment concerning mandatory subjects of bargaining without bargaining collectively with the Union in accordance with the requirements of Section 8(a)(5) of the Act.

(k) Refusing to bargain with the Union by failing to timely furnish the information in its October 5, 2000 and

March 12, 2001 letters to the Respondent that is relevant and necessary to the Union's performance of its function as bargaining representative.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer John Pinkston, Bobby Marks, Howard Cranford, and Clyde Evans full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make John Pinkston, Bobby Marks, Howard Cranford, Clyde Evans, and Fern Clark whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the amended remedy section of this decision.

(c) Make whole Frank Cruz, Richard Paiz, and any other unit employee for any losses suffered as a result of unlawful conduct that resulted in employees receiving less than they would have been entitled to for their work had the Act not been violated, in the manner set forth in the amended remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of John Pinkston, Bobby Marks, Howard Cranford, and Clyde Evans, the unlawful transfers of Frank Cruz and Richard Paiz, and the unlawful discipline and suspension of Fern Clark, and within 3 days thereafter notify these employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

(e) Rescind the unilateral changes implemented by the Respondent to the Dallas to Denver run, the Nuevo Laredo run, the policy regarding drivers correcting their timecards and Department of Transportation logs, the disciplinary policy regarding Department of Transportation logs, and the drug testing policy found to be unfair labor practices, and bargain with the Union in good faith until an agreement or impasse is reached.

(f) Furnish to the Union in a timely manner any presumptively relevant information requested in its October 5, 2000 and March 12, 2001 letters to the Respondent in the manner set forth in the amended remedy section of this decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Dallas, Houston, and San Antonio, Texas, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time after July 2, 2000.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with loss of employment or sale of the company because of your union activities.

WE WILL NOT threaten you with loss of seniority because of your union activities.

WE WILL NOT threaten to transfer you to a non-unit company because of your union activities.

WE WILL NOT coercively interrogate you regarding your union support or activities.

WE WILL NOT harass you with threats of discipline and termination because of your union activities.

WE WILL NOT deny you union representation during interviews where disciplinary action may result.

WE WILL NOT discharge, transfer, discipline, or suspend you because of your union activities.

WE WILL NOT make unilateral changes in the wages, hours, or other terms and conditions of employment in the bargaining unit of our employees represented by the American Postal Workers Union, AFL-CIO, without prior notice to or bargaining with that Union as your exclusive collective-bargaining representative.

WE WILL NOT fail to furnish or fail to timely furnish information requested by the Union that is relevant and necessary to the Union's functioning as the collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employees John Pinkston, Bobby Marks, Howard Cranford, and Clyde Evans full and immediate reemployment in their former jobs, or if those jobs no longer exist, to a substantially equivalent position without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make employees John Pinkston, Bobby Marks, Howard Cranford, Clyde Evans, and Fern Clark whole for any lost earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL make Frank Cruz, Richard Paiz, and any other unit employee whole, with interest, for any losses suffered as a result of unlawful conduct that resulted in the employee receiving less than they would have been entitled to for their work had the Act not been violated.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful action taken against John Pinkston, Bobby Marks, Howard Cranford, Clyde Evans, Frank Cruz, Richard Paiz, and Fern Clark, and we will, within 3 days thereafter, inform them in writing that we have done so and that our unlawful actions will not be used against them in any way.

WE WILL rescind the unlawful unilateral changes to the Dallas to Denver run, the Nuevo Laredo run, the policy regarding drivers correcting their timecards and Department of Transportation logs, the disciplinary policy regarding Department of Transportation logs, and the drug testing policy found to be unfair labor practices, and upon request bargain with the Union concerning any proposed changes.

WE WILL furnish to the Union in a timely manner any presumptively relevant information requested in its October 5, 2000 and March 12, 2001 letters to the Respondent.

SOUTHERN MAIL SERVICE, INC., BYRD TRUCKING CO., INC., S&B STAGELINES, INC., ALAMO MAIL SERVICE, INC., E&L MAIL, INC., AND H&L MAIL, INC., A SINGLE EMPLOYER

Elizabeth Washka, Esq., and *Michael Rank, Esq.,* of Ft. Worth, Texas, for the General Counsel.

Peter J. Leff, Esq., of Washington, DC, for the Charging Party.

David Curtis, Esq., Lori M. Carr, Esq., Ronald Gaswirth, Esq., and *John Brown, Esq.,* of Dallas, Texas, for the Respondent.

DECISION

STATEMENT OF CASES

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Ft. Worth, Texas during several days beginning on September 5 and ending on November 6, 2001. I have considered the full record and briefs of the parties in preparing this decision.

Respondent admitted several matters[1] including service of the various charges, jurisdiction and that the Charging Party (Union) is a labor organization. Respondent is a Texas corporation with an office and place of business in Dallas where it is engaged in the business of transporting mail. During the past 12 months in conducting its business operations, Respondent derived gross revenues in excess of $50,000 at its Dallas business operations, by transporting mail directly to customer locations outside Texas. At all material times Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the National Labor Relations Act. Tish Farrell is the president of all the companies involved as respondent including Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Svc., Inc., E&L Mail, Inc., and H&L Mail, Inc.

The Union conducted an organizing campaign in early 2000. During that campaign several employees openly participated in union activities. Ron Dakin and Rudy Sanchez testified about union meetings at a local convenience store – the Mity Kwik. Testimony showed that Richard Romero observed the employees engaged in union meetings at the Mity Kwik, and remained while eating ice cream at a table near the drivers attending the meeting. Romero offered sodas to drivers and organizers at a Mity Kwik Union meeting. John Pool came into two of the Mity Kwik meetings. On the first occasion he walked in, saw the employees, and left. Then around February or March John Pool came in the Mity Kwik and remained around 10 to 15 minutes. On July 20 when he received a written warning Frank Cruz asked Romero and Pool if he was being warned because of the Union Pool jumped up and said, "I saw you at that meeting. I saw you at that meeting."[2]

Respondent admitted that an election was conducted among employees in the following bargaining unit and the results were announced on August 31 and that the Union was certified as the exclusive bargaining agent of those employees on September 8, 2000:

> **Included:** All permanent full–time and part–time truck drivers employed by Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Svc., Inc., E&L Mail, Inc., and H&L Mail, Inc.,[3] a Single Employer, who are assigned, stationed or dispatched from the Employers' terminals located in Dallas, San Antonio and Houston, Texas.
>
> **Excluded:** All other employees including professionals, technicals, mechanics, dispatchers, clericals, administrative employees, guards and supervisors as defined by the Act.

THE UNFAIR LABOR PRACTICE ALLEGATIONS:

The complaint[4] alleged unfair labor practices by Respondent beginning in July 2000 and extending past May 2001, which included the following:

> RESPONDENT ENGAGED IN SECTION 8(a)(1) CONDUCT BY:
>
> John Pool:
>
> -Interrogating employees regarding the Union in July 2000;
>
> -Threatening employees with loss of employment in July 2000;
>
> -Threatening employees that the business would close in July 2000;
>
> -Threatening employees with loss of pay around September 15, 2000.

Frank Cruz testified that he was involved in union activity including attending union meetings and John Pool saw him at two of those meetings. Around July 2, 2000 Pool asked Cruz about the Union. Cruz replied, "We have to try it, because we ain't got nothing." Pool replied, "Well, Frank, do you know that we might—you might lose your job or else she might sell the company?"

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[1] Respondent stipulated supervisory allegations including that Tish Farrell is the owner, James Reilly is Vice President of Human Resources, Richard Romero is terminal manager in San Antonio, James McMullen is terminal manager in Houston, Bill Sturdivant was safety manager in Dallas until February 17, 2001, Ernest Cleveland is supervisor in Dallas and John Pool is supervisor in San Antonio.

[2] As shown below, John Pool denied that he told Cruz that he had seen him at a meeting. I credit the testimony of several witnesses including Frank Cruz, regarding meetings at the Mity Kwik convenience store. With that in mind and the full record I credit the testimony showing Romero and Pool's presence during Mity Kwik meetings.

[3] The employers are sometimes referred to as Southern Mail, Byrd, S&B, Alamo, E&L and H&L.

[4] The formal documents included a third order consolidating cases, consolidated amended complaint (GC Ex 1(gg) plus an amendment to amended consolidated complaint (GC Ex 1(jj).

In its answer Respondent alleged six "affirmative" defenses. Those included an allegation that the complaint failed to state a claim; that all Respondent's actions were motivated by business reasons; that Respondent's actions were taken without interference to employees' rights to organize; that some of the complaint allegations should be dismissed if those allegations exceeded the scope of the underlying charges; that the claims are barred by estoppel and waiver; and that the claims are barred by the applicable statute of limitations. Some factors that may touch on those defenses are discussed herein but to the extent those matters are not discussed below, I find there was no evidence supporting any of the various claims.

In the amendment to amended consolidated complaint, General Counsel seeks additional remedies including an order reimbursing alleged discriminatees for extra federal and state taxes; and a Mar–Jac Poultry remedy.

Respondent distributed a flyer (GCExh. 2)[5] to its employees a few weeks before August 31, 2000 regarding seniority. Ron Dakin with Rudolfo Sanchez[6] talked to John Pool about that flyer. Pool said that the Union wanted a one–company seniority. Dakin replied that was not the Union's position. Pool said that the Union testified in the hearing in Ft. Worth that all the companies involved were one company and, so since "we're one company," if you vote the Union in we are going to go with this one–company seniority list but if you do not vote it in we are going to stay with our company–by–company seniority. Pool said there were five or six drivers with high seniority that wanted to move from Dallas to San Antonio and those drivers would be bumping San Antonio drivers off their runs. Dakin testified that a one–company seniority system would place some of the drivers on the "outside."

Ron Dakin testified that around September 15 while Dakin was in the office getting time cards for John Pool, Pool asked him how the Union was coming along. Pool said that he had just gotten off the phone with Mrs. Farrell[7], and she was really considering cutting back the runs to 40 hours a week. Dakin asked why and Pool replied that if we get a contract that calls for time and a half over 40 hours Mrs. Farrell said she was not going to want to pay and so she was thinking of cutting the runs back to 40 hours a week. Dakin said it would be a big blow for that to happen. Pool replied that he was not the boss and was just relaying the information. John Pool denied telling an employee that the Company was considering cutting back drivers' runs or hours to 40 hours a week.

John Pool testified that he is the assistant terminal manager for Respondent in San Antonio. He denied that he told any driver that the Company was considering cutting back drivers' runs to 40 hours a week. Pool denied that he told anyone that the Company would go to a Company–wide seniority system if the Union was voted in and if the Union were not voted in, the Company would stay with the individual company–by–company system. He denied that he told anyone they might lose their job or the Company might be sold if the Union was voted in. Pool denied telling anyone that he saw him or her at a union meeting. He denied that he instructed anyone to record anything other than actual time on logs or time cards and he denied telling anyone to falsify their logs. Pool denied telling any driver to violate DOT[8] regulations.

The conclusions, credibility determinations and findings to all section 8(a)(1) allegations are set out below at pages 35 to 39.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (3) CONDUCT BY:

-Discharging John Pinkston around September 6 and Bobby Marks around
September 7, 2000.

John Pinkston drove for Leeway Freight from April 15, 1999 until he was transferred to Southern Mail a year later. He drove the Houston to Dallas run for Southern Mail. Pinkston's scheduled on that run was to leave Houston at 10:10 p.m. and arrive in Dallas at 6:55 a.m. On the return he left Dallas at 4:45 p.m. and arrived in Houston at 9:40 p.m. Bobby Marks drove for Southern Mail from February 28, 1989 until September 7, 2001.

Pinkston became involved in union activity during July and August 2000. About three or four times each week he wore a union cap, union tee shirt and union buttons. His picture was included on a union bulletin as one of the employees that would vote for the Union (GC Exh. 53). Around July 2000 Bobby Marks started wearing a union cap and union buttons. He signed a union authorization card and successfully solicited 7 or 8 employees to sign authorization cards.

The NLRB announced the election results on August 31, 2000. James Reilly testified that Pinkston made a Houston to Dallas run that night. Reilly and Earnest Cleveland checked Pinkston because of Pinkston's "time problem." Reilly was uncertain as to the time Pinkston clocked out on the morning of September 1, but he did recall that Pinkston did not clock out as early as he should have. Cleveland was also unable to recall when Pinkston ended his run, but he recalled that Pinkston claimed more time than he should have. Reilly notified the terminal manager in Houston, James McMullen, to check Pinkston out on the return trip to Houston. Pinkston testified that he arrived at North Houston between 9 and 9:15 p.m. Terminal Manager McMullen wrote a memo stating:

> On Sept 1, 2000 I observed John Pinkston arriving at the North Houston P O at 2108. At that arrival the driver had time to bump the dock and unhook and be off duty not later than 2130.

Pinkston testified that he arrived at the Houston bulk mail center[9] earlier than 9:40 but waited because he understood he

[5] IF THE UNION WINS–
WHAT ABOUT YOUR SENIORITY
Thank about the union's "one company" plan. They've already asked the government to treat drivers as if we had one company.
SO—the union wants to change the way we bid our runs.
NOW—We've always kept seniority on a company–by–company basis. If you bid a run for SMS, an AMS, H&L, BYRD or S&B driver cannot bump you or bid on your run! Same goes for them. The drivers for each company were protected.
THEN—If the union wins, then one seniority list—that means that drivers from another company—even from another city—could take your route if they've got more seniority, whether or not they've bid a regular run and whether or not they've ever worked for the company you work for.
I think this idea is being pushed by those that stand to gain something ONLY for themselves.
Think about whether or not you really want that. And think about whether the union is REALLY here to help you OR only help their friends.
Attached is a unified Seniority List based on hire date. Look at it and see what you think. If you think there is an error in your hire date please let Jim Reilly in Dallas know.

[6] Both Dakin and Sanchez testified about this incident.

[7] Tish Farrell is the owner of the employers.

[8] The Department of Transportation.

[9] There was one point of confusion that was not clarified during the hearing. According to his memo (GC Exh. 20), James McMullen observed Pinkston arrive at North Houston P O at 2108. Pinkston referred to arriving at the Houston bulk mail center before 2140 and waiting

was not to bump the dock until 9:40. He was required to check with the USPS[10] expediter at the BMC to determine the proper door, then back his truck and bump the dock. After that he unhooked the trailer and drove the tractor to hook up the next trailer for the next driver. Pinkston then did his post–trip inspection, finished his duties around 10:00 and clocked out at 10:00 p.m.

From June 20, 2000, until his termination, Bobby Marks operated a run from Dallas to North Houston and return by way of Huntsville. He also made another run every other Friday. On June 20 on his first regular Dallas/North Houston run Marks clocked out after his return to the Dallas BMC around 8:30 p.m. On June 21 he was told the tractor used on that run was a double run tractor and he should get back 30 to 45 minutes earlier. Mike Felton told him to fill out his timecards and logs[11] as the run was scheduled in order to avoid a DOT violation. Marks understood that he was to continue to log out at 8:30 p.m. Marks mistakenly logged out at 2230. He made that same mistake almost every night he worked that run.[12] Marks testified that he did not understand the 24–hour clock and mistook 2230 for 8:30 rather than 10:30 p.m. His timecard was returned on several occasions and he was instructed to correct the time. He was not disciplined for writing 2230 as his clock out time. On June 23 Safety Manager Sturdivant called Marks in and asked if he had made the alternate Friday run as shown on his documentation. Marks replied that was the way he made the run. Sturdivant told him that he was an hour and a half over the 70 hour in 8–day limit but he was not disciplined. During the period from June 20 until September 4, that was the only occasion during which a supervisor talked to Marks about his logs and timecards.

As was the case with John Pinkston, James Reilly and Earnest Cleveland investigated Marks on the night of August 31. Reilly and Cleveland observed Marks arrive at the Dallas BMC around 7:15 p.m. He got back to the Dallas terminal and finished his run at 7:44 p.m.[13] Reilly did not talk to Marks about his time. Marks was placed on off–duty status. On September 4 Marks was told to see Ernest Cleveland. Marks told Cleveland that he needed to talk about his timecards because he had made a mistake and caught it on August 31. Marks went in the office with Cleveland and Mike Felton—the branch manager. Cleveland said, "Bobby, you're being put on suspension for falsifying timecards." Later that week Marks talked with James Reilly from a speakerphone in Cleveland's office. Reilly told him that he was terminated for falsifying timecards.

On September 6 James McMullen phoned Pinkston that he was terminated for falsifying a timecard. Pinkston asked but McMullen did not say which timecard. Pinkston then phoned Ernest Cleveland and asked him why he did not tell Pinkston that he was going to be terminated. Cleveland told him that he did not know he was going to be terminated. Pinkston talked with James Reilly that week but Reilly told him only that he had been terminated for falsifying his timecard. Reilly did not tell him which timecard he was accused of falsifying.

CONCLUSION

CREDIBILITY:

I credit the testimony of Bobby Marks and John Pinkston in view of their demeanor and the full record. Bobby Marks and John Pinkston's testimony was essentially in accord with that of James Reilly, Earnest Cleveland and James McMullen regarding their arrival at various terminals. Marks and Pinkston did not testify in conflict with evidence that Marks incorrectly marked his timecard two hours after he was instructed to log out or that Pinkston routinely showed the same check in and check out times. The testimony of Marks and Pinkston regarding instructions from supervision as to their clocking in and out was not disputed. The question was never as argued by Respondent, (i.e. whether Marks and Pinkston's misstated their time). In fact, both admitted to altering their time in accord with instructions from Respondent at various times during their tenure with the company.

FINDINGS:

Pinkston and Marks were active supporters of the Union. Both wore union hats, and buttons at work. Pinkston's picture and name appeared on a union leaflet titled "We're Voting Yes." In view of Pinkston and Marks's union activity, Respondent's other unfair labor practices and the timing of its actions against Pinkston and Marks (i.e. those actions were initiated on the day the Union won the election), it is proper to infer Company knowledge[14] of Pinkston and Marks's union activities [*Pan–Oston*, 336 NLRB No. 23, slip op. 23 (2001)] and in view of the showing that Respondent engaged in numerous unfair labor practices both during and after the union organizing campaign, I find that Respondent demonstrated union animus [*Caterpillar, Inc*., 322 NLRB 674, 678 (1996)]. In view of the full

before bumping the dock there at the BMC at 2140. Pinkston's time card shows that he was on break from 20.92 until 21.17, before clocking out at 22.00. Pinkston was not asked about apparently being on break at the time he was observed at the North Houston post office. The record does not clear up the inconsistencies noted in this footnote. Therefore, I have not considered any of this in my deliberations regarding the complaint allegations.

[10] The United States Postal Service.

[11] Each driver is required to maintain a log, which is based on a graph set out on the basis of a civilian clock (i.e., showing a.m. and p.m.). The log must be turned in each day and it then goes through a log checker system. That checker system generates a report if a DOT violation has occurred (GC Exh. 8). Drivers were also required to maintain daily timecards. Timecards are set on a military (24 hour) clock. Time cards are imputed into a computer system and a timecard summary report is generated (GC Exh. 82).

[12] Marks testified to four exceptions to his logging out at 2230. On two occasions Marks recorded his time out as 2130 when he did in fact finish work at 9:30 p.m. and on the last two days he worked,—August 30 and 31—he logged out at 2030.

[13] 7:44 was the approximate time Marks usually finished. In accord with his instructions from Mike Felton, he intended to log out at 8:30. Usually, as shown above, he mistakenly logged out at 2230. Marks caught his mistake and logged out at 2030 on August 30 and 31. He testified that he tried to tell that to Earnest Cleveland.

[14] As noted above, in addition to Pinkston's open union activities, the one–sided victory by the Union on August 31, made it apparent that a large majority of Respondent's drivers favored the Union.

record and the showing that Respondent was aware of Pinkston and Marks's problems with time, long before August 31, I find that Respondent was motivated to discharge Pinkston and Marks by their union activities. As shown by James Reilly's testimony, Respondent knew of Pinkston's "time problems" before the Union's election. The full record also shows that Respondent was fully aware of Marks problem with the 24–hour clock and his routine incorrect clock out. The question presented here is why did Respondent wait until the Union election had been announced to act against two employees that it knew were vulnerable to allegations of falsification of time cards. The only intervening factor shown to have occurred on August 31 was the announcement of the Union victory. I find that General Counsel proved that Respondent was motivated by its union animus, to terminate Bobby Marks and John Pinkston.

Respondent contends that Pinkston and Marks were discharged for business reasons. Pinkston and Marks falsified their time cards. I shall fully consider that contention to determine whether Respondent would have discharged Pinkston or Marks in the absence of his union activities.

In the first instance, there appears to be serious doubt as to whether Pinkston actually falsified his time card on September 1. In fact, the undisputed evidence shows that he did not. Pinkston testified that he was scheduled to bump the dock in Houston at 9:40 p.m. and, even though he arrived earlier than that, he waited until 9:40 to bump the dock. He testified that was his understanding of his schedule (i.e. he was not to bump the dock before 9:40 p.m.). Respondent offered no evidence to rebut Pinkston's understanding in that regard. After bumping the dock, Pinkston performed the remainder of his duties including performing his inspections and gathering his belongings. He testified that he finished his run around 10:00. There was no contrary evidence. No one testified that Pinkston did anything else. Nevertheless, without more and without even checking for Pinkston's version of the facts, Respondent discharged John Pinkston.

Bobby Marks presented an opposite situation. Marks clearly marked his timecard incorrectly until he caught his error on August 30.[15] He marked his card with the same time he had routinely marked his time out. Before August 29, Pinkston routinely marked that he was clocking out at 10:00 and Marks routinely marked that he was clocking out at 2230. In actual fact Pinkston knew he was finishing his shift around but not necessarily exactly at 10:00 p.m. and Marks finished his shift around 30 to 45 minutes before 8:30 and thought he was logging out at 8:30 p.m.[16] For some time before August 31, Respondent had the time cards showing how Pinkston and Marks routinely logged out. Therefore, Respondent knew that both appeared vulnerable since it could reasonably assume that both would log out in their routine manner on August 31 and September 1. In other words, Respondent knew that it had documentation that it felt would justify discharging either Pinkston or Marks at its pleasure. It was not until the Union won the election that Respondent decided to take advantage of those records. Respondent refused to consider the explanation offered by Bobby Marks on September 4. In fact, it is apparent that Respondent knew that Marks habitually marked his time off incorrectly at 2230, long before August 31.

There is a question of whether Respondent departed from past practice to discharge Pinkston and Marks. If that is found to be the case, a question arises as to whether that new practice was itself discriminatorily applied since it came immediately after the election of the Union. Here, again, the evidence supports General Counsel. Before August 31, by all accounts, even those of Respondent's witnesses, both Pinkston and Marks had problems keeping accurate time records. Pinkston and Marks testified that they falsified time records but at the direction of supervisors.[17] As shown throughout this record, it was Respondent's practice before August 31 to tolerate and even encourage drivers to falsify logs and time records in order to avoid breaking DOT regulations. For example, Pinkston credibly testified that he was directed to record the same start and finish times and did so from February 2000[18] (GC Exh. 22).

There is also a question of whether Respondent was actually concerned with its drivers' time records as those records impacted on an employee's pay. It was Respondent's practice to pay drivers a benchmark or standard of performance amount set by Respondent. That standard of performance depended on Respondent's determination of how long the particular run should take. Drivers that exceeded the time established by the particular standard of performance were paid the higher amount on the basis of an hourly rate, but the driver was counseled and discouraged against exceeding the standard of performance. On occasion when Respondent found that a driver had received pay for exceeding the standard of performance, that driver was asked to sign a standard form that permitted Respondent to deduct funds from the employee's paycheck to repay wages paid in excess of the benchmark (GC Exh. 15).

It was not always the case that drivers benefited through extra pay by exceeding the standard of performance. In the case of John Pinkston on September 1, there was no evidence that the time recorded exceeded the standard of performance for that run. Pinkston's testimony was consistent with his timecards showing that he usually clocked in and out at the same times each day.

I am convinced that Respondent would not have terminated John Pinkston or Bobby Marks in the absence of their union

[15] Although he routinely marked his clock out at 2230, Marks caught his error and clocked out correctly on August 30 and 31. As shown herein he tried unsuccessfully to explain his errors to Earnest Cleveland.

[16] As shown above, Marks was instructed to log out at 8:30 p.m. even though he finished his run 30 to 45 minutes before 8:30 in order to return his truck for it to be ready for its double–run.

[17] For example, Terminal Manager McMullen and supervisor Felton told Pinkston in February 2000, to start his time card for his Dallas to North Houston run at 4:20 or 4:25. Pinkston asked if he could start his time card at 4:15 and McMullen and Felton agreed. Time cards show that after his February meeting, he did start his time cards at 4:15 [16.25 as shown on Respondent's 24 hour clock that reflects portions of the hour by 100s (GC Exh. 22)].

[18] Respondent expert witness Carl Bass testified that he examined Pinkston's 2000 time cards and found the entries to be consistently the same. The time cards are in evidence as GC Exh. 22.

activities. I find that Respondent discharged Pinkston and Marks because of their union activities and Respondent failed to show that Pinkston or Marks would have been discharged in the absence of his union activities.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (5) CONDUCT BY:

-Unilaterally reducing the runs of extra–board drivers in Beaumont from about 6.5 to 5.5 hours in September 2000.

-Failing and refusing to furnish information requested by the Union since about October 4, 2000;

-Unilaterally altering the hours and routes of the Dallas to Denver run around October 14, 2000;

-Unilaterally transferring drivers assigned to the Denver–Dallas route to the extra–board around October 14, 2000; -Unilaterally laying off Springfield drivers around October 14, 2000; -Failing and refusing to meet and bargain with the Union following Union written and oral requests around September 29, October 6, October 9, October 10 and October 12, 2000;

-Failing and refusing to bargain with the Union concerning the alteration in the hours and route of the Dallas to Denver runs since September 29, 2000;

-Failing and refusing to furnish information requested by the Union since about October 5, 2000, regarding the alterations in the Dallas to Denver runs;[19]

-Unilaterally laying off Springfield drivers around October 14, 2000.

On September 29, 2000, Respondent notified the Union that it had received notice from USPS that effective October 14, 2000, the schedule of the Dallas to Denver runs would change and that those changes would affect 10 jobs. Respondent was willing to negotiate over changes (JX 1). The Union gave Respondent a letter during October 5, 2000, negotiations,[20] that requested information for the purposes of bargaining (J Exh. 2).

On October 6 Respondent faxed the Union a letter[21] containing old and new schedules with the names and locations of the affected drivers (J Exh. 3). Respondent notified the Union. It had determined that the best way to operate the new run was out of Amarillo, Texas and it proposed that Springfield, Colorado drivers be given the option of relocating and working out of Amarillo but that drivers wishing to relocate must notify it by October 10, 2000. Respondent provided the Union with the names of the affected drivers and trip schedule information. Respondent did not provide the Union with the USPS change order, the reasons why Respondent no longer planned to run the trips out of Dallas and close down the Springfield relay point, or which stops were included in the changed runs. (J Exh. 4 and 5).

On that same day,—October 6—the Union responded to Respondent's letter. The Union protested that no negotiations were held on the Dallas/Denver matter when the parties met on October 5 and that Respondent had unilaterally made changes including that the work will be moved to Amarillo and the Springfield, Colorado relay point would be shut down; that no negotiations had been made regarding the impact of Respondent's changes; and that the October 10 deadline for receipt of notice from drivers was premature. The Union protested that it needed the remaining information so that it could bargain over the changes in the Dallas/Denver runs; that it wished to negotiate over how trucks would be relayed, where layovers would be, seniority rights, transfers, lay–offs, the right of Dallas drivers to bid on other work and Respondent's responsibility to

[19] The Union's request included:

A copy of the United States Post Office change order,

Employer's proposal of how the runs were to be altered,

The lengths of layovers,

Intermediate stops,

A list of drivers impacted by the alteration,

All reports or studies considered by the Employer in connection with the alteration, and,

A list of specific schedule alterations being proposed by the Employer.

[20] The letter, which was dated October 4, requested, among other things:

2. Any and all records of discipline for unit employees in the past 5 years.

5. Copies of all current contracts with the USPS and all changes to those runs since the commencement of each contract.

6. Copies of all current run schedules as issued by the USPS.

7. Seniority lists covering all current bargaining unit employees as they have been used in the past for the run bidding process. We will need a separate list for each company or extra board by terminal.

9. A wage history of each current employee, both unit and non–unit, including the current wage, the date and amount of the last increase, and the wage paid to each employee for each of the past three years.

11. All past disciplinary records and other information related to the recent discipline of Bobby Marks, John Pinkston, Todd Colburt, Tony Martinez and Mark Wallace within the past 5 years.

14. Wage rates and benefits information provided to Leeway drivers. We also need a list of any postal mail haul run performed by a Leeway driver in the past year including names, dates, employee addresses, and run number for Leeway drivers who have hauled mail for Leeway in the past year.

15. Copies of contracts or other documents related to the hiring of Drivers Unlimited for postal runs. We also need a list of any postal mail haul run performed by a Drivers Unlimited driver in the past year including names, dates, employee addresses, and run numbers.

16. The actual 401(k) plan and SPD for White & Lasater, Inc., 401(k) Profit Sharing Plan; Information on company contribution levels; Present funding for the plan; Complete portfolio; Contracts with administrators and investment directors; and name with titles of all trustees. Include company earnings information as used to determine profit sharing for unit employees.

[21] Among other things the letter included: [T]he Company has determined that the best way to operate the new run is out of Amarillo, Texas. The Company purposes that the Springfield drivers be given the option of relocating and working out of that location. If any Springfield (or Dallas) driver wishes to relocate, we must be notified by noon on October 10, 2000. [The Company] has no other operations in the Springfield, Colorado area. I am advised there is available work for affected Dallas based drivers. Each of them will be given opportunity for dispatches."

notify affected drivers; and the Union protested Respondent's decision to move work to Amarillo and shut down the Springfield relay point (J Exh. 4).

The Union sent a letter on October 10 requesting the balance of the requested information (J Exh. 5). The Union complained to Respondent that it had not been provided with requested information and the Union specifically proposed contract language to the effect that the runs would continue out of Dallas and continue to relay out of Springfield, Colorado. On October 11 Respondent advised the Union that its proposal to maintain the status quo could not be honored (J Exh. 6). By phone on October 11 the Union notified Respondent it was still waiting for the information it had requested on October 5. Respondent supplied the Union with the requested information on October 13 for the runs that were to be implemented the next day. Respondent did not forward to the Union the USPS change order. Instead Respondent stated that it had not yet received that change order. The Springfield, Colorado drivers were terminated or laid off and the Dallas drivers were placed on the extra board. The Union phoned Respondent's attorney stating the Union had not received all the requested information. Respondent wrote the Union on October 13, enclosed leave/arrival times on the new routes and stated that more information would be sent to the Union upon receipt (J Exh. 8). Respondent implemented the changes the next day—October 14, 2000.

Respondent wrote the Union on October 19 and rejected the Union's proposal to maintain the status quo and stated it was willing to discuss any proposals, including severance, preferential hiring, recall, etc. Respondent stated it would provide the USPS change order upon receipt by it and at that time, it would schedule a meeting to discuss the matter.

As shown above, the Union also sought information regarding collective bargaining in its information request dated October 4 and given to Respondent on October 5 (fn 19, supra). On November 20 Respondent responded to those requests and provided information relative to Union requests 1, some of 3, 10, 12, 13 and 17. Respondent refused to provide information in response to Union requests 2, 5, 6, 9, 11 and 14. Names were provided in response to Union request 3 but not current schedules, run numbers, terminals and employment status (J Exh. 2). In response to request number 7, Respondent provided a Company–wide seniority list even though its practice was to recognize seniority within the six different companies. Regarding 16, Respondent conditionally offered a brochure promoting a 401(k) plan.

CONCLUSIONS

CREDIBILITY:

The facts regarding these allegations are generally found in the joint exhibits, which were stipulated in evidence by all parties. To that extent there is no credibility dispute. To the extent credibility determinations are required, I shall make those determinations below under findings.

FINDINGS:

Respondent is obligated to refrain from making unilateral changes in unit employees' terms and conditions of employment unless the parties have reached agreement or overall impasse (*Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). Two exceptions are provided to the rule in *Bottom Line*, including an exception when an employer establishes that it is confronted with an economic exigency compelling prompt action short of any type relieving the employer of its obligation to bargain entirely. In that instance the employer's duty is to provide the union with adequate notice and an opportunity to bargain [*RBE Electronics of S.D.*, 320 NLRB 80 (1995)]. General Counsel argued that Respondent failed to establish an exception to the *Bottom Line* rule.

The information sought by the Union was probably relevant or could have been of use to the Union in carrying out its statutory duties [*Public Service Electric & Gas Co*., 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998); *Finn Industries, Inc*., 314 NLRB 556 (1994)]. Respondent did not provide the Union with some of the requested information, which was relevant to bargaining over the Denver/Dallas runs until after it had permanently implemented the changes.[22] The evidence illustrated there was an unreasonable delay in providing requested information that constituted an unfair labor practice of refusal to bargain [*Bundy Corp*., 292 NLRB 671 (1989)]. General Counsel and Charging Party also argued, that Respondent's conduct made it impossible for the Union to negotiate over the effects of the unilateral changes in the Dallas/Denver runs [*Miami Rivet of Puerto Rico*, 318 NLRB 769, 771 (1995)].[23] Respondent's alleged unlawful action resulted in the layoff of several drivers with their regular runs removed.

Whenever a union requests information, an employer is obligated to furnish information with reasonable dispatch when there is a probability that the desired information is relevant and that it will be of use to the union in carrying out its statutory duties and responsibilities [*NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Finn Industries, Inc*., 314 NLRB 556 (1994)].[24]

Even though Respondent expressed a willingness to bargain over changes in Dallas/Denver, it did not provide the Union with requested information, before it permanently changed working conditions for unit employees, in regard to the Dallas/Denver run. From the full record it is apparent that Respondent unilaterally altered the hours and routes of the Dallas/Denver run, unilaterally transferred Dallas/Denver drivers to the extra–board, on October 14; unilaterally required Springfield drivers to notify it by October 10 or their intent to relocate, failed and refused to furnish information requested by the

[22] Although the USPS required initiation of changes on October 14, there was no showing that Respondent's actions including the deadline for notice from drivers as to relocation, was necessary in order to satisfy the USPS directive.

[23] Respondent's unlawful failure to provide requested and relevant information prevented my finding a waiver of its rights by the Union refusing to meet to negotiate over the effects of Respondent's Dallas/Denver changes [*FMC Corp*., 290 NLRB 483, 488 FN. 14 (1988)].

[24] Respondent contented that the Union is a business competitor and that some of the requested information is confidential and must not be disclosed to a competitor. The Board has decided that question in favor of the Union. In a recent case the Board found that the AFWU is not a competitor of mail haulers for USPS [*CMT Inc. and American Postal Workers Union, AFL–CIO*, 333 NLRB No. 151 (2001)].

Union since October 5 regarding alterations in the Dallas/Denver runs; and unilaterally laid off Springfield drivers on October 14. Despite the USPS change order requiring changes on October 14, Respondent failed to show an economic necessity that required it to engage in the unilateral changes and refusal to provide requested information. Respondent failed to show why it was impossible for it to comply with the USPS order without making those unilateral changes and without timely furnishing information requested by the Union and negotiating after the Union had a reasonable opportunity to consider that information. An example of Respondent's unlawful action was its demand that Springfield drivers notify it by October 10 of their intent to relocate. Until Respondent supplied the Union with requested relevant information, there could be no meaningful negotiations on the necessity for Springfield drivers to relocate. Therefore, the deadline for those drivers to notify of their intent in that regard was premature.

I do find that Respondent engaged in unlawful conduct as proscribed in section 8(a)(1) and (5) when it, failed and refused to furnish the Union with requested information which was relevant to the Union's duties as exclusive collective bargaining representative of Respondent's employees, from October 5; unilaterally altered hours and routes of the Dallas/Denver run on October 14; unilaterally transferred drivers assigned to the Dallas/Denver run to the extra–board, on October 14; unilaterally required Springfield drivers to notify it of their intent regarding relocation by October 10; unilaterally laid off Springfield drivers on October 14; and refused to meet with the Union concerning the alteration in the hours and route of the Dallas/Denver runs by failing to timely furnish the Union with requested information which was relevant to the Union's duties.[25]

I find the record does not show that Respondent unilaterally reduced the runs for extra–board drivers in Beaumont.

RESPONDENT ENGAGED IN SECTION 8(a)(1) CONDUCT BY:

James McMullen:
-Interrogating an employee regarding the Union around October 28; and
threatening an employee with transfer to a lower paying job with a non–union company around October 28, 2000.

Lenorah Antoine was involved in the union campaign. She passed out pins and pamphlets in the summer of 2000 and she was on the negotiating committee. On October 28, 2000 Antoine submitted a time sheet requesting two days off to attend a collective–bargaining session. She was called back in and met with Terminal Manager James McMullen. McMullen threw the time sheet across the desk and asked Antoine what that was. Antoine replied that her understanding was that "we had to fill this out in order to be off the two days in November to attend the meeting in Dallas." McMullen replied: "Well, can you afford to take two days off? What is the Union promising you?" Antoine replied that all she knew was they were going to take care of that. McMullen then stated "Well I was fixing to change you over to Leeway."[26] McMullen denied that he ever said "can you afford to take two days off" to Lenorah Antoine and he denied that he ever asked her "what is Union paying you?" He denied that he told Antoine that he was going to transfer her to Leeway. On cross–examination, McMullen testified that when Lenorah Antoine brought in a time off request, he "asked her, was the Union paying her, or something to that effect." McMullen admitted that Leeway Transportation is based out of the H&L terminal in Houston, that the Farrells own Leeway and that McMullen is responsible for the general operations of Leeway Transportation. He admitted that one driver has been transferred from H&L to Leeway Transportation.

The conclusions, credibility determinations and findings to all section 8(a)(1) allegations are set out below at pages 35 to 39.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (3) CONDUCT BY:

-Transferring Frank Cruz and Richard Paiz to lower paying routes around November 4, 2000.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (5) CONDUCT BY:

-Unilaterally altering the hours and route of the San Antonio and Nuevo Laredo drivers in September 2000.

Frank Cruz has been a driver for Alamo Mail for about 35 years. Richard Paiz has been a driver for about 30 years and has driven for Alamo Mail for 11 years. Both participated in union activities during the 2000 campaign. Cruz talked to drivers about signing union cards and attended about 12 union meetings at Mity Kwik. During one meeting John Pool came in and looked directly at Cruz and the union representative. As shown herein, on July 20, 2000 Cruz asked Pool if he was getting a write up because of the union and Pool repeated several times that he had seen Cruz at that meeting. Cruz wore a union tee shirt and a union hat at least once a week. Paiz attended three of the union meetings and his name was on a union leaflet distributed before the election (GC Exh. 3).

Cruz and Paiz ran the Nuevo Laredo, Mexico run. Cruz made the run for about 6 years and Paiz was also on the run during a time with Cruz—from March or April 2000. The two remained on the run until November 4, 2000. Cruz and Paiz alternated positions on the run. Until September the run ran from a point at exit 325 near Waco, Texas to Nuevo Laredo and returned. The run started when the truck was met at exit 325, and either Cruz or Paiz drove to San Antonio, which was approximately midway to Nuevo Laredo. Then the other driver, either Cruz or Paiz, drove on to Nuevo Laredo and returned to

[25] As shown below, these unfair labor practices must be remedied by, among other things, making whole those bargaining unit drivers for wages and benefits lost because of Respondent's unlawful action in violation of section 8(a)(1) and (5).

[26] On October 28 Antoine was a driver with H&L Mail. H&L drivers are included in the bargaining unit but Leeway Transportation drivers are not included in the unit.

San Antonio where the other would take the run back to exit 325 where he met George Nichols. Nichols was the driver that ran between exit 325 and Dallas. Cruz and Paiz had no trouble with the run.

In April or September 2000[27] a new commercial traffic bridge was opened at the border. From that time there were delays on the run caused by: (1) traffic on the new bridge caused at least in part, by the bridge opening at 8:00 a.m. each day[28] resulting in a back up of traffic waiting for that opening; (2) the addition of approximately 25 miles driving each way to the new bridge; (3) a change in handling by customs when customs started a new screening program that included x–raying of trucks; and (4) loss of a privilege—(i.e., at the old bridge the customs officials would allow the truck to pass other traffic but on the new bridge the truck was required to line up and go through customs with the other commercial traffic). Respondent made changes in the run on September 9.[29] The starting time was moved back from 6:45 a.m. to 2:00 a.m. and the time for the run to return from Nuevo Laredo was moved to 2:00 p.m. Two stops were removed and the run was extended by 100 miles,[30] to run past exit 325 all the way to the Dallas airport international mail service.

As shown above, the Union was declared winner of the election on August 31 and certified bargaining representative on September 8, 2000. I find the Respondent made the above changes on the day after the Union was certified. At that time Respondent had a duty to notify and bargain over mandatory conditions of employment. It failed to notify the Union prior to the September 9 changes in the Nuevo Laredo run.

After the September changes, Richard Romero made a run with Cruz and said that the run could not be made on the allotted schedule. Nothing was done to change the run and enable the drivers to run on schedule. About a month after Romero rode with Cruz, he told Cruz and Paiz that they were getting 5500's[31] every time they ran late on the Nuevo Laredo run.

During the third week of September 2000 Richard Romero confronted Cruz and Paiz stating they needed "to start doing something about this run because it's coming in late. The USPS is talking about pulling the run or canceling the run." Romero demanded that Cruz drive faster on the route to make up the lost time caused by the delays.[32] Cruz and Paiz agreed among themselves that they would not exceed the speed limit in order to make up the delays because that could jeopardize their drivers' license.

On November 4, 2000, Cruz was told by John Pool that he was being changed to the McCallan run and that he should see Richard Romero if he had questions. Cruz went to Romero who said they had decided to put new people on the Nuevo Laredo run. Cruz asked if his seniority did not count. Romero told him to either take the McCallan run or they would use the extra–board. Both Cruz and Paiz were taken off the Nuevo Laredo run. Cruz accepted the McCallan run and has continued to drive that run since that day. He makes less than he did on the Nuevo Laredo run. Respondent placed Anselmo Sanchez on the Nuevo Laredo run, and used extra–board drivers on the U.S. side of the border. It required Sanchez to run each leg of the run continuously rather than the practice it had used with Cruz and Paiz of alternating from week to week on each leg of the run. Sanchez continued to make the run late as had Cruz and Paiz and he left the route after a week. Dela Fuente was then assigned the Mexico leg of the run and Michael Brown was assigned to drive the U.S. leg.[33]

CONCLUSION

CREDIBILITY:

I was impressed with the demeanor and testimony of both Frank Cruz and Richard Paiz and I credit their testimony.

FINDINGS:

General Counsel argued that Respondent transferred Cruz and Paiz off the Nuevo Laredo run because of their union activities. Both Cruz and Paiz engaged in union activities and Respondent was aware of their union activities. As shown above, Cruz and Paiz attended union meetings and Respondent observed those meetings. Both Richard Romero and John Pool went into Mity Kwik while meetings were in session and on two occasions, Romero or Pool remained for several minutes observing the employees at the meeting. Cruz wore union hats and shirts and solicited other drivers to sign union cards and Paiz's name appeared on a union leaflet distributed to employees.[34]

The credited evidence shows that Respondent was motivated by the union activities of Cruz and Paiz and especially by those activities of Cruz. On July 2, 2000 John Pool asked Cruz about the Union and Cruz replied the employees have to give it a try.

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[27] There was conflicting evidence regarding when the bridge first opened (R. Exh. 23). I find that dispute is not material in view of other evidence showing that Respondent made changes in the run in September.

[28] The bridge closed each night at midnight.

[29] Respondent argued that no changes were made to the Nuevo Laredo run until after Cruz and Paiz were removed from that run. GC Exh. 37 shows under item 7 that a change was made on September 9, 2000.

[30] Before September 9 the run ended near Waco but was extended on September 9 to the Dallas International Service Center located at the Dallas airport.

[31] A forms 5500 (Contract Route Irregularity Reports) was issued by the Postal Service whenever Respondent failed to complete a run within the allocated time designated by the Postal Service.

[32] Before November 2000 Respondent replied to the Postal Service 5500s by stating that run was delayed because there was not enough time on the Mexico trip and crossing through U.S. Customs (GC Exh. 44).

[33] Fuente and Brown continued to receive 5500s on November 14, 17, 22, December 4, 5, 6, 7, 10 and 13. Neither Fuente nor Brown has been replaced. General Counsel argued that USPS never penalized Respondent for tardiness on the Mexico run (GC Exh. 39).

[34] Approximately 80% of the employees voted for the Union—i.e., 193 to 45. Therefore, even in the absence of all other evidence, Respondent had a reason to believe its employees favored the Union [***Pan–Oston Co***., 336 NLRB No. 23, slip op. at 4 (2001)].

Pool told Cruz that he might lose his job or the Company may be sold if the union is voted in. On July 20 Cruz asked if he was receiving a write–up because of the union and Pool replied that he had seen Cruz at that meeting. Finally, it is reasonable to assume that the involuntary transfer of drivers, especially when one was such a visible union advocate as Frank Cruz, had the effect of discouraging membership in the Union [***Electromedics, Inc***., 299 NLRB 928, 937 affd 947 F.2d 953 (10th Cir. 1991)]. On the basis of the record and especially in light of the above findings, I am convinced that Respondent was motivated by its union animus in changing Cruz and Paiz from the Nuevo Laredo run [***J.R.L. Food Corp.,*** 336 NLRB No. 36, slip op. 19 (2001); ***Tocco, Inc***., 323 NLRB 480 at 487(1997)].

General Counsel also argued that Respondent was motivated by Cruz and Paiz collectively deciding to refuse to drive faster. I am unable to find support for that argument in view of the absence of evidence that Respondent knew of that concerted activity. Therefore, I find that the evidence fails to support a finding that Respondent was also motivated by animus against that concerted activity.

As to whether Respondent would have transferred Cruz and Paiz from the Nuevo Laredo run in the absence of union activity, I have considered the testimony of Vice President Lance Farrell. Farrell testified that, among other reasons, the drivers were transferred because of their gross insubordination. Cruz and Paiz made the runs on November 1 and 2, which were alleged by Respondent as being holidays in Mexico. The USPS schedule did not include those two dates as holidays. Farrell testified that the schedule was incorrect and that Respondent had a letter from the postmaster in Laredo stating the run should not be made on November 1 or 2 but Respondent failed to produce that letter after being directed to do so.[35] There was no documentation that Respondent investigated whether Cruz and Paiz made the run on either November 1 or 2 without justification.

The testimony of Lance Farrell tended to show, among other things, that the changes brought about by the new bridge and by Respondent changing the route, had little to do with Respondent's decision to transfer Cruz and Paiz. I find that Respondent failed to prove that Cruz and Paiz engaged in gross insubordination and Respondent failed to prove that Cruz and Paiz did anything else other than their union activity, which justified their transfer. I find that Respondent's purported unhappiness with Cruz and Paiz was a pretext designed to hide its true reason for their transfers. I find that Respondent engaged in conduct in violation of section 8(a)(1) and (3) by transferring Cruz and Paiz off the Nuevo Laredo run and Respondent failed to prove it would have transferred Cruz or Paiz in the absence of their union activity. The evidence showed that Respondent made September changes in the Nuevo Laredo run without notice or bargaining with the Union. I find that Respondent engaged in conduct in violation of section 8(a)(1) and (5) by unilaterally changing the Nuevo Laredo run in September 2000.

[35] There was no documentation showing that Cruz and Paiz were advised of the alleged letter from the Laredo postmaster.

RESPONDENT ENGAGED IN SECTION 8(a)(1) CONDUCT BY:

By Bill Sturdivant
-Interrogating an employee about the Union and the Union's involvement in a
Department of Transportation investigation around November 15, 2000.

While in Houston during his work in the second week of November 2000, Howard Cranford stopped and talked with Safety Manager Sturdivant.[36] Sturdivant asked, "By the way, did—did the Union have anything to do with turning the Company into DOT?" Cranford responded that he "did not know but he thought about it himself."

The conclusions, credibility determinations and findings to all section 8(a)(1) allegations are set out below at pages 35 to 39.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (5) CONDUCT BY:

-Unilaterally altering its policy regarding drivers correcting their time cards and
DOT logs in February 2001.
-Unilaterally altering the disciplinary policy regarding DOT logs in February 2001.

James Reilly testified that it is Respondent's policy to issue verbal warnings, written warnings and suspension or even discharge for violating DOT regulations. He testified that falsification of a log might justify termination.[37] Prior to the August 31, 2000 election and after June 1997, only three employees were terminated for falsification of a log (GC Exh. 9).[38] Those three were discharged in 1997, 1998 and April 2, 1999.

Vice president Reilly testified that whenever payroll employees noticed errors in timecards they would alert the dispatcher who would have the driver correct the time card, and whenever there was a problem with a driver's log, the Company would routinely return the log with the driver's paycheck so that the log could be corrected. Before August 31 Respondent did not routinely terminate employees for timecard errors. Even repeat offenders were oftentimes ignored or, at most, oftentimes received verbal counseling. Before the end of August, drivers were not closely monitored. Respondent dispatcher Valdez admitted that the drivers had frequent problems maintaining their logs. Valdez would correct logs for drivers. Respondent called David Mohon as an expert witness. Mohon testified that he examined Respondent's time cards and drivers' logs and, before March 2001, the Company did not have any formal procedure for checking time cards against logs. Logs

[36] The parties stipulated that Bill Sturdivant was a supervisor and the safety manager in Dallas until February 17, 2001.

[37] Despite Reilly's testimony, Respondent argued that it has practiced a zero tolerance policy for DOT falsification since 1994.

[38] Respondent's schedule of terminations (GC Exh. 9) shows the following employees were terminated of falsifying logs: Ronald Swaggerty on March 2, 1998, Emit Tasker on April 22, 1999, and Orville Wheat on June 20, 1997.

and timecards were checked separately. As shown above—(fn. 11),—drivers were required to turn in their logs each day. The log went through a log checker which generated a report whenever a DOT violation occurred. Drivers also maintained daily timecards which were imputed into a computer which generated for Respondent a timecard summary report.

Evidence including testimony by John Pinkston, Bobby Marks and Julio Gomez shows that it was Respondent's policy before and, in some instances even after, August 31 to ignore time card and log errors, and to even encourage its drivers to falsify logs.[39] Drivers running from Louisiana would drop off their logs and timecards in Dallas before finishing their runs in Fort Worth. Since those drivers had not finished their runs it was obvious to Respondent that those logs and timecards were not always accurate.

Respondent reacted immediately after the Union's August 31 victory by changing its policy regarding time clocks. John Pinkston and Bobby Marks were discharged for alleged time infractions even thought neither had received any prior disciplinary action. Respondent's action against Pinkston and Marks tends to illustrate that Respondent changed to a less flexible time clock policy after the August 31 election. Respondent took other actions toward a new policy. Immediately after the election supervisors Felton and Cleveland started checking timecards against logs.

During and after the union organizing campaign, Respondent engaged in threats to change working conditions. For example, around July 2, 2000 John Pool threatened Frank Cruz that Cruz might lose his job or else Respondent may sell the company because of the union; on July 20 Pool implied to Frank Cruz that Cruz was receiving a write–up because Pool saw him at a union meeting; a few weeks before August 31, 2000, Respondent threatened to change to an all company seniority system; around September 15 John Pool threatened Ron Dakin that Respondent was considering cutting back the runs to 40 hours a week; in late October James McMullen threatened to transfer employee Lenorah Antoine out of the bargaining unit; in November Respondent changed the Dallas–Nuevo Laredo run and transferred drivers Cruz and Paiz off that run; and in December 2000 James Reilly threatened to fire anyone that drove in excess of the speed limit.[40]

The record illustrated that Respondent's disciplinary policy regarding DOT logs took a turn around February 1, 2001. Respondent discharged three more employees and on that occasion—(unlike the situations with Pinkston and Marks),— the discharges were for alleged log falsifications. As shown below, General Counsel alleged that two of those—Howard Cranford and Clyde Evans—were unlawfully discharged.

Dwight Boston and Willie Vaughn met with James Reilly and Earnest Cleveland on January 30, 2001 regarding a rumor that a number of employees had been fired. Reilly replied that drivers had been suspended and not fired. Soon thereafter Respondent discharged drivers Howard Cranford, Clyde Evans and Rudy Cates and Respondent President Tish Farrell issued a memo to all drivers, regarding those terminations (U. Exh. 1):

> Several drivers are upset and have asked about the termination of several long term drivers. I wanted you to hear directly from me the cause of those terminations.
>
> Two members of the APWU Bargaining Committee quite properly brought to the Company's attention that certain drivers were falsifying their DOT logs.
>
> Bill Sturdivant carefully investigated the allegations. In addition, Jim Reilly and Earnest Cleveland spoke to the affected drivers. They admitted to falsifying their logs.
>
> We informed the DOT and have terminated the drivers identified. We had no choice under applicable law under our view.
>
> I urge each and everyone of you to refresh your memory of DOT regulations and Company policy that says that the falsifying of DOT logs is an offense for which you will be discharged. The DOT also has the power to fine and/or prosecute the affected drivers.
>
> I too am very upset these people are no longer with us. Several of these drivers are long term employees and friends of mine but there was no choice. The DOT can shut the Company down if it condoned or tolerated such behavior. In that case no one has a job. I cannot and will not put all of you and your families at risk for such behavior.

Farrell's letter shows that Respondent changed its policy regarding DOT logs and alleged to its employees that change was caused by complaints from the Union.

CONCLUSIONS

CREDIBILITY:

As shown herein, I credit the testimony of John Pinkston, Bobby Marks and Julio Gomez. I also credited the evidence showing the Respondent threatened its employees because of their union activity. I also credit the testimony of Dwight Boston in view of his demeanor and the full record.

FINDINGS:

As shown above the allegations regarding Respondent and its alleged change in that policy, regarding DOT logs, raises questions under section 8(a)(5). Under section 8(a)(5) it is necessary to show that Respondent changed a condition of employment that was a mandatory subject of bargaining [***Pepsi–Cola Bottling Co., of Fayetteville,*** 330 NLRB No. 134 (2000)], without notifying or bargaining with the Union before the change [***Filene's Basement Store***, 299 NLRB 183 (1990)].

Respondent failed to notify the Union of its plan to change its time and logs policies in August and February. Hours, plant rules, and discipline are mandatory subjects of bargaining

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[39] In February 2001, Romero and Pool encouraged Julio Gomez to make a run for another driver even though that would cause Gomez to go over his DOT limit. Romero told Gomez to go to Pool and learn how to fix his logbooks. As shown above, Gomez was suspended for refusing to make a run that would cause him to exceed the DOT hours limit. In June 2000 Felton told a driver to make a run differently from the schedule but log it as scheduled. Romero pressured Dakin and Sanchez in December 2000 to falsify timecards to show breaks they had not taken, and to falsify their logs to match the timecards.

[40] Reilly told Ron Dakin that he would fire anyone that drove over the speed limit.

[***American Warehousing***, 311 NLRB at 386; ***Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO v. Jewel Tea Co***., 381 U.S. 676, 691 (1965); ***Schraffts Candy Co***., 244 NLRB 581 (1979); ***National Licorice Co. v. NLRB***, 309 U.S. 350 (1940)], and an employer may not lawfully change or modify the terms and conditions of employment without giving the collective bargaining representative notice of the intent to change and an opportunity to bargain. I find that Respondent violated section 8(a)(1) and (5) by unilaterally changing its rules regarding time and logs maintenance; and by unilaterally altering the disciplinary policy regarding DOT logs.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (3) CONDUCT BY:

-Imposing more onerous working conditions by altering its disciplinary policy
regarding DOT logs around February 1, 2001.
-Terminating Howard "Bo" Cranford and Clyde Evans around February 1, 2001.

As shown above, Dwight Boston and Willie Vaughn, on behalf of the union, met with James Reilly and Cleveland on January 30, 2001 regarding a rumor that a number of employees had been fired. Reilly replied that drivers had been suspended and not fired. Soon thereafter Respondent discharged drivers Howard Cranford, Clyde Evans and Rudy Cates. On February 1, 2001 Respondent owner Tish Farrell issued her memo—(quoted above)—alleging that the Union had brought to her attention that certain drivers were falsifying their DOT logs.

General Counsel alleged that the discharges of two of those drivers,—Cranford and Evans,—were unlawful. Howard Cranford drove with Southern Mail from May 5, 1989 until he was fired on February 1, 2001. Cranford was a visible union supporter. He solicited drivers to sign union cards and was successful in signing up from 6 to 9 employees. He wore union tee shirts on Fridays and a union hat all the time. Clyde Evans started as an extra–board driver out of Dallas for Southern Mail on August 8, 2000. Evans signed a union authorization card on his first day of work.

Cranford testified that he was told to falsify his logs by his terminal manager in December 1999 in order to avoid truthfully showing that he was running over the DOT 70 hours in 8 days rule.[41] Again in January 2000 he was instructed to falsify his log—(this time by supervisor Cleveland)—in order to avoid revealing violation of the 70–hour rule. Supervisor Felton asked Cranford in March or April 2000 why his logs and time cards did not match and Cranford told him that the run could not be made legally but that his timecards were accurate. Cranford was not disciplined.

After showing up at the terminal, Cranford refused to take an assigned run on September 30, 2000. When Cranford showed up for work the next evening, Dispatcher Anthony Valdez told him that he could not make his run because he had refused to make a run the night before. On October 2, 2000 Cranford explained to Cleveland and Sturdivant that he had stopped making runs that would put him in violation of the 70–hour rule. He explained the situation that had started in 1999 later that day in a meeting with James Reilly and Cleveland. At that time Cranford received a written warning (GC Exh. 54).[42] On occasions after October 2 Cranford reminded Reilly and Cleveland of the problem. Respondent argued that Cranford continued to falsify his log throughout the last half of 2000. With the exception of October 2 (GC Exh. 54), Cranford was not disciplined until January 29, 2001.

Evans did not receive instructions on how to complete a log after starting work in August 2000. Safety Manager Sturdivant was scheduled to instruct Evans but Sturdivant had an emergency and failed to give Evans those instructions then or later. In September 2000 Evans was assigned a run from Dallas to Amarillo. Evans told Dispatcher Valdez that he could not make the run because he had small children and the run required an 8–hour break. Valdez told him to make the run without the 8–hour break. He made the run on September 15 without taking an 8–hour break.[43] Evans was not disciplined for that incident.

In the fall, 2000, Anthony Valdez called Evans in and said Evans was having trouble with his logs. Valdez told Evans he had to come in and watch a film regarding maintaining DOT logs before he could drive again. After Evans watched the film Valdez helped him update his logbook. Evans was not disciplined.

On January 29 Sturdivant told Cranford there was a problem with his log. Cranford said that he would continue to log the runs as ran and Sturdivant put him on off–duty status. Clyde Evans was called in to talk with Safety Manager Sturdivant on January 30, 2001. When they met Evans reminded Sturdivant that Sturdivant had never shown Evans how to prepare his logs. Sturdivant looked at Evans's log and said that Evans had run over on a previous run.[44] Evans testified that he had received an

[41] After running over 70 hours per 8 days Cranford's logs were returned and he spoke to a Dallas terminal manager. The manager, Sparks, told Cranford how to falsify his logs in order to avoid revealing violation of the 70–hour rule. Nevertheless, Cranford's was showing a 70–hour violation on his log in January 2000. At that time Earnest Cleveland told Cranford that he needed to take care of his logs and Cleveland showed Cranford how to falsify his log and avoid showing 70–hour violations.

[42] The warning said nothing about Cranford falsifying his log or violating the 70–hour rule. Instead it read:

1. Failed in your affirmative duty to notify dispatch of your available driving hours causing a trip to be late resulting in a 5500.

2. Failed, in your duty to record duty status changes as mandated by DOT regulations.

[43] Evans had trouble filling out his logs and the dispatcher, Valdez, routinely calculated Evans' hours and filled in the recap showing whether the driver was over on hours. Evans completed the graph on his logs such as the September 15 log, and Valdez did the calculations and recap. The September 15 graph shows that Evans was on duty from 9:30 a.m. until 12:00 p.m. without taking an 8–hour break (GC Exh 87).

[44] Evans testified that he could not recall when that run occurred but recalled that it was before Mr. Sturdivant called him in on January 30. Records (R. Exh. 21) showed that Evans had failed to take a DOT

emergency phone call on that run while in route to Amarillo, that his father had been rushed to the hospital. Evans testified that he made the turn around in Amarillo without taking a required 8–hour break. Sturdivant told Evans that he was going to give him a warning letter (GC Exh. 32).

Cranford met with Reilly and Sturdivant on January 30 but Reilly said he could not continue the meeting when advised that Cranford had brought in driver Jerry McCoy to act as his Union representative.

On January 31 Sturdivant phoned Evans to come into the office. Evans met with James Reilly and Sturdivant. Reilly asked Evans to explain his failure to take the rest break and Evans explained about the emergency call. Reilly said that what Evans had done was against DOT regulations and he was going to have to terminate him.

Reilly and McCoy met with Cranford again on February 2. Reilly told Cranford that his logs had been perfect until July. Cranford reminded Reilly that was so because Terminal Manager Sparks had told him to falsify his logs. Reilly sent Cranford home. He phoned later that day and told Cranford he was discharged.

CONCLUSIONS

CREDIBILITY:

I was not impressed with the demeanor of Howard Cranford. His testimony conflicts with substantial evidence showing that he falsified logs during the 6 months before his discharge. Therefore, I shall not credit his testimony to the extent it was in conflict with other evidence that was not specifically discredited. I was impressed with the testimony of Clyde Evans and I credit his testimony. As shown below, I do not credit the testimony of James Reilly or Earnest Cleveland.

FINDINGS:

I shall question whether Respondent was motivated to discharge Cranford and Evans because of its union animus. Cranford engaged in open union activity and Evans signed a union authorization card on his first day of work.

Cranford was told there was a problem with his log and he was placed in off duty status on January 29, 2001. As shown above, according to Cranford's testimony Respondent was fully aware of Cranford falsifying his log on numerous occasions before January 2001. First the then general manager, Tommy Sparks, told Cranford to falsify his log.[45] During the spring, 2000, Michael Felton asked about Cranford's log and time card not matching. Cranford explained the run was too long and would put him over on hours but, again, Cranford was not disciplined (R. Exh. 31).

Respondent argued that Cranford did regularly falsify his log during the second half of 2000. Nevertheless, the record shows that Cranford was not disciplined until after the Union won the August 2000 election. In October he was disciplined after telling Reilly and Cleveland that he had been instructed to falsify his logs. Even then Cranford was not disciplined for falsifying his log. He was disciplined for not recording his duty status and not notifying dispatch of his available driving hours (GC Exh. 54).

Evans received a warning letter on January 30 and was discharged on January 31, 2001 for failing to take an 8–hour break. He had failed to take an 8–hour break on the Dallas/Amarillo run on January 9, 2001. During that run Evans learned of his father's hospitalization and returned to Dallas without a break. Evans had seven other 10–hour infractions before January and was not disciplined.[46] As an example, in September 2000, Evans had made the same Dallas/Amarillo run without an 8–hour break and was not disciplined. On that occasion he protested that he could not make the run with the 8–hour break because he had young children to care for. Dispatcher Valdez told him to make the run without an 8–hour break and Evans did so. In October or November Evans met with Valdez and was told to complete grids[47] regarding his runs and Valdez completed the numbers for Evans, on the freight line and recap column. Evans was not disciplined even though he had incorrect logs.

The full record including evidence showing Respondent's knowledge of drivers' union activities, the 80 percent vote for the Union and Respondent's unfair labor practices tend to show that Respondent knew of Cranford and Evans's union activity.[48] At issue is whether Respondent was motivated by its union animus and whether Respondent was motivated to discharge Cranford and Evans in an effort to blame the Union for their terminations.

Tish Farrell attributed the discharges to the Union bringing to the Company's attention that certain drivers were falsifying their logs. Dwight Boston credibly testified that even though he and driver Willie Vaughn met with James Reilly to discuss the suspension of seven drivers, neither named drivers who were falsifying their logs. In fact in contesting the allegations that the Union had "(fingered) drivers about running illegal runs," the Union raised the question of how anyone other than the Company could know which drivers were falsifying logs (GC Exh. 80).

Respondent claimed that upon learning from the Union of drivers falsifying logs, it investigated the Union's information. If that is true, then Respondent must have acted very quickly. Boston and Vaughn met with Reilly on January 30. But Respondent had already confronted Cranford about his log on the 29th when Safety Manager Sturdivant told Cranford that he had

break during a January 9, 2001 run. The graph showed that Evans was on duty from 8:30 a.m. until 9:30 p.m. without taking an 8–hour break.

[45] Cranford's testimony about Sparks was not rebutted. Sparks did not testify.

[46] No records were produced pursuant to General Counsel's subpoena for, among other things, Evans's disciplinary records.

[47] Each driver log is set up as a graph or grid. In order to complete each day's log it is also necessary to compile figures. Valdez was telling Evans to line out the graph and that he (Valdez) would compile the figures.

[48] Under one of General Counsel's arguments it is not necessary to prove that Respondent actually knew that both Cranford and Evans favored the Union. General Counsel argued that Respondent discharged the two because of their union activity and that Respondent discharged the two in order to blame the Union for the discharges. Under the second argument it is unnecessary to show that Respondent knew both were union advocates.

a problem with his log and placed Cranford on off–duty. Evans was warned on January 30 for his January 9 run.[49] The credited evidence tends to show that Respondent was not truthful in Tish Farrell's January 30 memo and it also tends to show that Respondent issued that memo in an effort to place blame on the Union for an action it had already commenced. That evidence and the full record show that Respondent was motivated to discharge Evans and Cranford because of its union animus. [***Caterpillar, Inc***., 322 NLRB 674, 678 (1996)].

Respondent contended that Evans and Cranford were not discharged out of union animus and I shall consider whether Respondent would have discharged either in the absence of union activity. As shown herein, Cranford had several contacts with supervision regarding his log problem and Respondent had Evans' log showing his failure to take an 8–hour break in its possession since Evans finished his January 9 run. The record illustrated that Evans had several other 10–hour violations before January but was not disciplined. Here, as was the case in the discharges of Pinkston and Marks, Respondent was aware of the vulnerability of Cranford and Evans. After the January 30 meeting with representatives of the Union, Respondent elected to act on that knowledge and blame the Union for its discharge of two more union supporters. I find that Respondent discharged Evans and Cranford because of its union animus and that Respondent failed to show that it would have discharged either Evans or Cranford in the absence of union activity.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (3) CONDUCT BY:

-Reducing Julio Gomez's route by one day around February 15, 2001.

Julio Gomez has been a driver for about 20 years and has been a driver for Alamo Mail since about 1998. He was involved in the 2000 union campaign. Gomez attended about 10 or 11 of the union meetings. During one of those meetings Gomez was with Ron Dakin and a union representative when John Pool came in. Pool bought something, then turned around and saw Gomez, Dakin and union representative Dan Henderson talking. Pool remained in the store for about 10 or 15 minutes.

On February 7, 2001, at a Conoco gas station, John Pool told Gomez that he had to work on his days off. Gomez said that he had other plans and Pool replied that he had to work. Gomez stated that he would go over his hours if he worked all the days. Pool told him to go ahead and work. The next day Gomez called Richard Romero and told Romero that he was going to go over his hours. Romero told him to talk with John Pool the next day when he returned from San Antonio and see if he could fix Gomez's log book so that Gomez would have fewer hours. Gomez replied that he was not going to lie on his logbook. Romero told him to just come on over and see Pool. Gomez phoned driver Ron Dakin and told Dakin what had happened with Pool and Romero. Dakin accompanied Gomez to see Pool but Pool had already left. Gomez worked as scheduled. When he returned back in Laredo on Sunday, February 11, he calculated his hours at 67. Under DOT regulations, drivers are prohibited from exceeding 70 hours in an 8–day period. Gomez was scheduled to work the remainder of that day and the next day. He phoned Romero and told him of the 67 hours. Romero told him to take the remainder of the day off and start Monday morning. Gomez replied that was not possible because he was to leave on his regular run at 1:00 p.m. on Monday. Romero said that he was placing Gomez on Anselmo Sanchez's run. Gomez again replied that was impossible because he would not be able to take the required 8–hour break. Romero told him to go ahead and take the rest of the week off. Gomez said that he was going to call the DOT to see if he had enough hours to work or what. Romero asked if he was calling the DOT on him. Romero told him to take the rest of the week off then changed and said that he would call Gomez if he needed him again.

Gomez then phoned Ron Dakin and Dakin advised him to phone Safety Manager Sturdivant. When Gomez phoned, Sturdivant said he had already talked with Romero and was being mailed a copy of Gomez's timecard and logbook. Later that day Gomez phoned Sturdivant again and Sturdivant said that Gomez had been right and that he could start back to work the next day—i.e., Tuesday. On Tuesday Gomez was assigned to make a trip with another driver—(Ruben Gomez),—and Julio Gomez logged the trip as on duty not driving.[50] On Thursday John Pool told Gomez to phone Richard Romero. Romero told Gomez that Respondent was removing one day from his five day a week schedule and that he could drive that extra day if anyone went on vacation. Since then Gomez has run a 4–day schedule and his pay has been reduced each week by the one day he no longer works.

CONCLUSION

CREDIBILITY:

Respondent argued that Gomez should be discredited because he failed to answer some questions on cross–examination (Tr. 143–145). Mr. Gomez illustrated some difficulty in responding to a question about a conversation with Richard Romero. Most of Gomez's testimony is unrebutted. Therefore, and in consideration of his demeanor, I have not discredited Gomez's testimony to the extent it was supported by credited evidence and to the extent it was not rebutted by credited evidence. In that regard I credit Gomez's testimony regarding his above cited conversations with Richard Romero and Bill Sturdivant. That testimony was not rebutted. Neither Romero nor Sturdivant testified. I also credit his testimony about his conversations with John Pool. Pool was not asked about his conversations with Gomez. Pool did testify that he never instructed a driver to violate DOT regulations. As shown below, I do not credit Pool's testimony.

[49] In view of the above, it is apparent that Respondent's records including Evans' January 9 log and records generated by its log checker, showed that Evans had violated DOT regulations on January 9.

[50] Each log form has four options for the driver to fill in: (1) off duty; (2) sleeping berth; (3) driving, and (4) on duty, not driving (GC Exh. 7).

FINDINGS:

The above evidence is convincing that Richard Romero told Gomez to take the rest of the week off and that he would phone him if he needed him again, because of Gomez's union activity and his protests against being required to drive in violation of DOT regulations. Both his union activity and activity in protesting Respondent's efforts to force him to drive in violation of DOT regulations, constitute protected conduct [***Alumina Ceramics, Inc***. 257 NLRB 784 (1981)]. Gomez's contact with Safety Manager Sturdivant and his protests of Romero's action, was also protected activity [***Terminix Int'l. Co***., 315 NLRB 1283, 1287 (1995)]. In consideration of those facts and Respondent's union animus, I find that Respondent was motivated to initially suspend and subsequently, to reduce his work load, because of Gomez's union and protected activity.

I have also considered whether Respondent would have taken those actions against Gomez in the absence of his union and protected activity. The record revealed there was no intervening action between Gomez's protected activity and his suspension or his reduction in work. Gomez was told that he might be used to cover for drivers on vacation. Gomez had a regular run unlike extra–board drivers, and other drivers with regular runs were not used as extra–board drivers.

Respondent argued that the change in Gomez's route was not discriminatory because the USPS mandated it. Respondent failed to show that it was necessary to place Gomez on a shorter workweek because of the USPS. Therefore, I find that Respondent failed to prove that it would have suspended and reduced the work of Julio Gomez in the absence of his union and other protected activity. [***Wright Line***, 251 NLRB 1083 (1980); ***Ingles Markets, Inc***., 322 NLRB 122 (1996)].

RESPONDENT ENGAGED IN SECTION 8(a)(1) CONDUCT BY:

James Reilly around March 15, 2001:

-Advising an employee that he would monitor and keep an eye on the employee for 30 days;

-Threatening to discipline and terminate an employee if the employee did not increase the speed on the employee's route; and denying employee Fern Clark's request to allow a Union representative to participate in an interview, which Clark reasonably believed, would result in discipline.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (3) CONDUCT BY:

-Issuing a written warning to Fern Clark around February 26, 2001.

-Suspending Fern Clark around March 13, 2001.

-Issuing a written warning to Fern Clark around March 16, 2001.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (5) CONDUCT BY:

-Unilaterally transferring bargaining unit work to Leeway Transportation.

Fern Clark drove for Respondent from October 1997. She participated in the 2000 union organizing campaign by soliciting employees, distributing union literature and having her picture on a union pamphlet distributed to others. She lived in Monahans, Texas where she drove the Monahans/El Paso route from Fridays through Sundays. She transferred and moved to Dallas on February 18, 2001. She was assigned the Dallas/Van Horn, Texas route and James McMullen told her she would start the route on Monday, February 26. Clark called in on February 24 and the dispatcher told her that she was late for an assigned run. Clark came in but was 2 hours late leaving and arriving in Van Horn. Instead of taking her required 8–hour break, she took a 6 hour 45 minute break in order to return on schedule. Cleveland issued Clark a write–up on Monday for being late for a scheduled run. He told Clark that she would be fired if it happened again. On March 12 she received another write–up and was placed off–duty for that same failure to take an 8–hour break, when she met with McMullen and Allen (GC Exh. 58).

James Reilly and McMullen met with Clark on March 15. Reilly went into several matters including her failure to take an 8–hour layover on February 24; her taking 15–minute breaks instead of 30–minute breaks; and her not driving fast enough. Clark brought along driver Dwight Boston as her union representative but Reilly instructed Boston that he was there only as a witness and he could not speak or ask questions during the meeting. James Reilly told Clark she would be monitored for 30 days. Reilly issued Clark a disciplinary write–up the next day.

CONCLUSION

CREDIBILITY:

As shown herein, I was impressed with Fern Clark's demeanor and her full testimony. I credit her testimony in full.

FINDINGS:

As shown above, the evidence illustrated that Clark was questioned by Cleveland about being late, and then warned by Cleveland, McMullen and Reilly for failing to take a full 8–hour break on February 24. The record shows that Respondent was inconsistent in enforcing DOT regulations. In fact, as shown above, before the Union was elected on August 31, 2000 Respondent tolerated and even participated in helping employees to circumvent DOT rules. Nevertheless, when it discovered that Clark had failed to take a full 8–hour break Respondent issued two warnings to Clark and cautioned her against engaging in other activities forbidden by its Vice President James Reilly. I am convinced that Respondent treated Clark in a disparate manner and that it was motivated to do so by her union affiliation. On the day before Reilly issued his disciplinary write–up to Clark, she came to a meeting with a union representative—Dwight Boston. Reilly permitted Boston to remain

but he told Boston that he could not speak during the meeting with Clark. I find that Clark was unreasonably denied her right to representation during that interview which she reasonably believed could have resulted in disciplinary action[51] [***NLRB v. J. Weingarten, Inc***., 420 U.S. 251 (1975); cf. ***Southwestern Bell Tel. Co. v. NLRB***, 667 F.2d 470, 473–474 (5th Cir. 1982)]. Although it is not disputed that Clark failed to take an 8–hour break on her February 24 run, the record shows that Respondent did not start to routinely enforce DOT rules until the Union was elected. I find that General Counsel proved that Respondent engaged in conduct in violation of section 8(a)(1) by advising Clark she would be monitored; by threatening to discipline and terminate Clark if she did not increase her speed; and by denying Clark the use of a union representative during an interview in which she reasonably believed she would be disciplined. I find that Respondent engaged in section 8(a)(1) and (3) activity by issuing warnings to Clark on February 26 and March 16 and by suspending Clark on March 13, 2001, because of its union animus.

I shall consider whether Respondent illustrated that it would have disciplined Clark in the absence of union activity. As to whether Respondent proved that it would have warned Fern Clark for being late returning from her Amarillo/Dallas run, warned her for violation of the 8 hour break violation, and cautioned her for taking 15 minute breaks and not driving fast enough, the record illustrated that Respondent did not routinely discipline employees in that manner before the Union was elected. The record shows that Respondent placed Clark in position where she could not avoid being late on February 24 and 25, because James McMullen had advised her that she did not work until February 26. Shortly after her February 18 transfer to Dallas; Clark was told she would have no assignment before Monday, February 26. Without her knowledge and despite what she had been told by McMullen, she was assigned a run out on February 24, which was to be followed by her return, all before Monday, February 26. Clark was already late for that run when she phoned in on February 24. At that point Clark had done nothing other than follow the direction of James McMullen. Nevertheless, she was late and as a result of that tardiness, she was disciplined. I find that Respondent unreasonably placed Clark in a position where she could not avoid disciplinary action and, as a result she was warned and suspended. I find that Respondent failed to prove that it would have taken action against Fern Clark for her activities on February 24 and 25, in the absence of her union activities.

Counsel for General Counsel argued in its brief that James Reilly corroborated that Fern Clark drove extra trips from Monahans to El Paso and he corroborated that extra trips were being handled by Leeway Transportation drivers. In that regard General Counsel cited an affidavit given by Reilly (GC Exh. 52). Nevertheless, there was no showing that those assignments to Leeway constituted a change in mandatory bargaining conditions. Reilly also testified in that affidavit, "I do not believe that any extra runs to Monahans were taken away from regular Monahans drivers and given to Leeway drivers." I find the evidence failed to prove that Respondent engaged in section 8(a)(1) and (5) activity by transferring bargaining unit work to Leeway Transportation. The record failed to show that Respondent did anything different in that regard that had been its practice before the Union was elected.

RESPONDENT ENGAGED IN SECTION 8(a)(1) CONDUCT BY:

An Unknown Agent:

-By following an employee on the employee's route from Monahans to Dallas.

After Fern Clark transferred to Dallas and received a write–up from Earnest Cleveland and warnings from James McMullen and James Reilly, Reilly told her that she would be monitored for 30 days.

Clark testified that after a 9–hour breakdown on her March 27, 2001 run, during which she called in to her dispatcher, a white vehicle followed her from Midland, Texas. The vehicle turned away when she entered Sweetwater but she noticed it behind her again about 20 minutes after she left Sweetwater. She stopped at a rest stop but did not notice the white vehicle until she returned on the freeway. The white vehicle then reappeared and followed her all the way to the bulk mail center. Clark could not identify the driver.

The conclusions, credibility determinations and findings to all section 8(a)(1) allegations are set out below at pages 35 to 39.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (5) CONDUCT BY:

-Unilaterally altering the random drug test to its employees from March 15, 2001.

Until March 2001 Respondent conducted a random drug test policy. Employees were given 24 hours to complete a drug test at a clinic.

Respondent used a different practice in March 2001. It did not notify the Union of a proposed change. Employee James McCoy was required to complete a random drug test immediately upon demand and was not permitted to leave the premises for the test (GC Exh. 16 at 7; J Exh. 65 at 1). McCoy was was not given 24 hours to complete his drug test. On March 15, 2001, driver David James was also required to take a drug test and James was not given 24 hours to complete a drug test. Instead James was required to take a drug test immediately at Respondent's facility.

CONCLUSIONS

CREDIBILITY:

The evidence is not in dispute regarding this allegation. Respondent admitted that it changed from a policy of permitting employees to take random drug test at off premises clinics within 24 hours to an immediate on–premises clinic testing. I was impressed with the demeanor and testimony of James McCoy and David James and I credit their testimony.

[51] Clark had been suspended by McMullen for DOT violations before she was called in to meet with McMullen and Reilly over that and other issues.

FINDINGS:

An employer is obligated to notify and bargain with its employees' bargaining representative before it makes changes in terms and conditions of employment which constitute mandatory subjects of bargaining [***Tocco, Inc.,*** 323 NLRB 480, 488 (1997); ***Edgar P. Benjamin Health Care Center***, 322 NLRB 750, 753, 754(1996)]. Drug testing procedures are mandatory subjects of bargaining because of their effect on discipline and job security [***Johnson–Bateman Co.,*** 295 NLRB 180 (1989)]. By failing to notify and give the Union an opportunity to bargain before it changed its drug testing policy, Respondent engaged in section 8(a)(1) and (5) conduct.

RESPONDENT ENGAGED IN SECTION 8(a)(1) and (5) CONDUCT BY:

-Failure to provide the Union with requested information.

The Union submitted an information request on March 12, 2001 seeking a list of all bargaining unit employees, their street addresses, phone numbers, social security numbers and employment status. The Union phoned Respondent on March 14 and Respondent promised to get the information requested on March 12. Respondent replied on May 15 but failed to include phone numbers, social security numbers and employment status. The Union has not received that information even though Respondent stated on March 20, that it would provide that information.

CONCLUSIONS

CREDIBILITY:

Except as specifically noted, I have based the findings in this section on records including among others, the joint exhibits, other documentary evidence where the authenticity is not in dispute and on testimony which is not disputed by Respondent.

FINDINGS:

Information concerning employees in the bargaining unit is presumptively relevant [***Sheraton Hartford Hotel***, 289 NLRB 463 (1988)]. Respondent acted unlawfully in failing to provide the Union with information it requested on March 12, 2001. I find that Respondent engaged in conduct in violation of section 8(a)(1) and (5) by not supplying the Union with phone numbers and employment status of bargaining unit employees, since March 12, 2001. As to the Union's request for unit employees' social security numbers, I am not convinced that information is relevant to the Union's bargaining duties and I find that Respondent did not act unlawfully in refusing to furnish its employees' social security numbers.

CONCLUSIONS TO ALLEGATIONS THAT RESPONDENT ENGAGED IN CONDUCT IN VIOLATION OF SECTION 8(a)(1):

CREDIBILITY:

In determining credibility I have considered the demeanor of all witnesses. I considered the full record as to the versions of events presented by the many witnesses. In that regard I took special notice of evidence showing consistency and inconsistency in the events recalled by many witnesses.

As to specific testimony I have considered many factors including those raised by the parties in their briefs. As to the John Pool allegations, Respondent argued that Ron Dakin admitted that Pool did not threaten him during their conversation. Dakin's assessment as to whether Pool's comments constitute a threat is not material to my determinations. Nor does Dakin's assessment to that effect show inconsistency in his other testimony. He testified as to what Pool told him and even though he feels that does not constitute a threat, there was no showing that Dakin felt his other testimony was in error.

Respondent also argued that Dakin's testimony is filled with hearsay.[52] Respondent evidently referred to Dakin's testimony that supervisor Pool told him what was said to Pool by Respondent owner Tish Farrell. In that regard it is important to keep in mind that the complaint allegations do not include Tish Farrell as engaging in unlawful threats. Instead, the complaint alleged that John Pool uttered the threats. With that in mind it is clear that General Counsel seeks to prove that Pool's comments were unlawful and that it is not material whether Tish Farrell actually said anything to Pool. In other words, Dakin's testimony was received for what supervisor John Pool said to Dakin—an employee. The testimony was not received to show what Mrs. Farrell may or may not have said to Pool or whether or not Farrell engaged in unlawful conduct by telling Pool that Respondent was considering cutting back the runs. Therefore, as received, the testimony did not contain hearsay.

I observed John Pool's demeanor. As shown above he testified in opposition to several witnesses to the effect that he did nothing in the way of threatening employees because of the union, telling employees he saw him at a union meeting, or did or suggested anything contrary to DOT regulations. I also observed the demeanor of several witnesses that testified in direct conflict with John Pool, including Ron Dakin, Frank Cruz, Rudolfo Sanchez, Richard Paiz and Julio Gomez and I saw nothing in their demeanor which caused me to doubt their testimony concerning Pool. On the other hand I found Pool's demeanor wanting as he testified the he did nothing regarding the union including threatening employees or saying he saw an employee at a union meeting and that he did nothing to encourage employees to circumvent DOT regulations. I do not credit Pool to the extent his testimony conflicts with that of Dakin, Cruz, Sanchez, Paiz or Gomez. On the other hand I do credit the conflicting testimony of all those witnesses other than Pool.

James McMullen, like Pool, denied, that he made statements as alleged by Lenorah Antoine. McMullen denied asking Antoine if she could afford to take two days off and that he asked her what was the Union promising her. McMullen denied telling Antoine that he was going to transfer her to Leeway Transportation. McMullen also denied telling any driver to falsify

[52] See FRE Rule 801(c).

logs or timecards or to violate DOT regulations or put anything other than actual times on logs. Nevertheless, under cross–examination McMullen admitted that when Lenorah Antoine brought in a request for time off, he asked her "was the Union paying her, or something to the effect." I was not impressed with McMullen's demeanor or testimony and I do not credit his testimony. I credit the testimony of Lenorah Antoine in view of her demeanor and the full record. In view of my observations of demeanor and my findings above, I credit the testimony of Ron Dakin and Fern Clark regarding contact with James Reilly. I also credit Fern Clark's testimony that a white vehicle followed her on March 27, 2001. As shown above, I was not impressed with the demeanor and testimony of Howard Cranford. His testimony regarding Bill Sturdivant was not disputed. Sturdivant did not testify. Therefore, I credit Cranford in that regard.

FINDINGS:

The credited evidence proved that John Pool questioned Frank Cruz during the summer of 2000, about the Union and Pool threatened Cruz with loss of his job and the possible sale of the Company. Pool threatened Ron Dakin and Rudolfo Sanchez that Respondent may go to a company–wide seniority system if the Union was voted in and he promised that Respondent would remain with the current company–by–company seniority system if the employees did not vote in the Union. Pool threatened there were five or six drivers with high seniority that wanted to move from Dallas to San Antonio and he implied that those drivers might move if the Union was voted in and Respondent went to a company–wide seniority system. Pool questioned Ron Dakin, on how the union was coming along. Pool threatened Dakin that Respondent may cut back runs to 40 hours a week if the Union succeeded in getting a contract for time and a half.

The evidence proved that James McMullen interrogated Lenorah Antoine on October 28 about her request to take two days off to attend Union business, whether she could afford to take that time off and what was the Union promising her. McMullen then threatened that he was going to transfer Antoine out of the bargaining unit to Leeway Transportation.

The Board has found "in the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." ***Westwood Health Care Center***, 330 NLRB No. 141 (2000); where the Board cited, among other cases, ***Bourne v. NLRB***, 332 F.2d 47 (2nd Cir. 1964); ***Perdue Farms Inc. v. NLRB***, 144 F.3d 830 (D.C. Cir. 1998); ***Timsco, Inc. v. NLRB***, 819 F.2d 1173 (D.C. Cir. 1987). Counsel for General Counsel argued that Pool's otherwise innocuous interrogation of Cruz was unlawful because it was accompanied by two clear threats: (1) the company might be sold; and (2) Cruz might lose his job; and neither threat involved a prediction of business consequence beyond Respondent's control. She cited ***Bourne v. NLRB***, 332 F.2d 47 (2nd Cir. 1964); ***Rossmore House***, 269 NLRB 1176 (1984).

Here, all the evidence regarding interrogation involved known union advocates. Ron Dakin, Frank Cruz, Lenorah Antoine, Fern Clark and Howard Cranford all admitted to being involved in activities for the union. As shown below, I find that Respondent knew of each of their union activities (see ***Rossmore House,*** supra). All the incidents alleged as section 8(a)(1) violations[53] involved more than interrogation. John Pool threatened Ron Dakin that Respondent's owner was considering cutting hours back to 40 a week if the Union came in. Pool threatened Frank Cruz that Cruz may lose his job or Respondent may sell the company if the Union came in. Pool threatened Dakin and Rudolfo Sanchez that the Company may go to an all company seniority system if the Union came in. Pool misrepresented that the Union was seeking an all company seniority system.[54] James McMullen threatened Lenorah Antoine with a transfer out of the bargaining unit to another Farrell company. James Reilly denied Fern Clark full union representation during a meeting that was likely to result in discipline and harassed Clark for failing to take an 8–hour break and for not driving fast enough.[55] The Board and courts have consistently found threats of the type found herein, to be violations of section 8(a)(1) [***Addicts Rehabilitation Center Fund, Inc***., 330 NLRB No. 113, slip op. 9 (2000); ***Castaways Management, Inc***., 285 NLRB 954, 972 (1987); ***ITT Fed. Services Corp***., 335 NLRB No. 79, slip op. 5 (2001); ***Poly–America, Inc. v. NLRB***, 260 F.3d 465, 484 (5th Cir. 2001)].

As argued by Counsel for General Counsel, Pool's post–election threats occurred during the time when the employees expected their bargaining agent to press for the fruits of collective bargaining and were not couched in terms of legitimate business consequences of unionization citing ***G.B. Electric***, 319 NLRB No. 88 (1995).

James Reilly prohibited Dwight Boston from speaking during the interview that Reilly and McMullen held with Fern Clark. Before that interview Clark had been warned twice for failure to take an 8–hour break and she reasonably expected that to be one topic in the interview. I find that Clark reasonably believed that interview may result in discipline. Therefore, Respondent violated section 8(a)(1) [***Southwestern Bell Telephone Company***, 251 NLRB 612, 613 (1980)].

As to the allegation that Respondent engaged in an unfair labor practice by following Fern Clark's truck on March 27, 2001, I find the evidence is insufficient to support such a determination. It is true that James Reilly threatened to monitor Clark for 30 days and that March 27 fell within the 30 days after Reilly made that threat and it is also true that some suspicion arises from strange behavior of the white vehicle that followed Clark. That alone does not establish that an agent of Respondent drove the car. Furthermore, even if I assume for the sake of discussion, that the driver was an agent or employee of Respondent, there is not showing that the driver was engaged in

[53] With the exception to the alleged interrogation of Howard Cranford by Bill Sturdivant in November 2000.

[54] Pool contended the Union's argument during the representation proceeding that all the companies constituted a single company, illustrated the Union's desire to have an all company seniority system.

[55] As shown herein, Clark's warnings and suspension is also considered as a section 8(a)(3) violation and is considered under the ***Wright Line*** standard.

unlawful conduct. Fern Clark phoned in a break down and she was delayed for 9 hours. Therefore, even if the vehicle was from the Company, there was no evidence that it was not there to lend assistance if needed following Clark's break down. With all that in mind, I am unwilling to conclude on the basis of the record, that Respondent unlawfully followed Clark's truck. I find that General Counsel failed to prove that Respondent engaged in an unfair labor practice by following Fern Clark on March 27, 2001.

I find that Respondent engaged in activity in violation of section 8(a)(1) by John Pool threatening its employee with loss of employment, that the business would close, and with loss of pay; by James McMullen threatening an employee with transfer to a lower paying job; and by James Reilly threatening to terminate its employee for not increasing her speed and by denying employee Fern Clark an opportunity to use her union representative during a meeting she reasonably believed could result in disciplinary action.

CONCLUSIONS TO ALLEGATIONS THAT RESPONDENT ENGAGED IN CONDUCT IN VIOLATION OF SECTION 8(a)(1) and (3):

I find that Respondent discharged John Pinkston, Bobby Marks, Howard Cranford and Clyde Evans; transferred Frank Cruz and Richard Paiz to lower paying routes; imposed more onerous working conditions on its drivers by altering its disciplinary policy regarding DOT logs; reduced Julio Gomez's route by one day per week; and issued warnings and suspended Fern Clark, because of its union animus and Respondent failed to prove that it would have taken any of those actions in the absence of its drivers' union and other protected activities. As shown herein, the record does show, among other things, that Respondent was inconsistent in enforcing DOT regulations. Clark, [***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 f.2D 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)].

CONCLUSIONS TO ALLEGATIONS THAT RESPONDENT ENGAGED IN CONDUCT IN VIOLATION OF SECTION 8(a)(1) and (5):

I find that Respondent was obligated to recognize and bargain with the Union as exclusive collective bargaining representative of its drivers from August 31, 2000; that Respondent unilaterally altered the hours and routes of the Nuevo Laredo runs; failed and refused to furnish information requested by the Union; unilaterally altered the hours and routes on the Dallas/Denver run; unilaterally transferred drivers from the Dallas/Denver route to the extra–board; unilaterally laid off Springfield drivers around October 14, 2000; failed and refused to bargain with the Union concerning the alteration in hours and route of the Dallas/Denver runs since September 29, 2000; unilaterally altered its policy regarding drivers correcting their timecards and logs; unilaterally altered its policy and its disciplinary policy, regarding drivers correcting timecards and DOT logs in February 2001; and unilaterally altered its employee random drug test policy on March 15, 2001.

CONCLUSIONS OF LAW

1. By its conduct shown below in paragraphs 2, 3 and 4, Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Svc., Inc., E&L Mail, Inc., and H&L Mail, Inc., a single employer and the respondent herein, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (5) and Section 2(6) and (7) of the Act.

2. By threatening its employees[56] with loss of employment, that the business would close, with loss of pay, with transfer to a lower paying job with a company not in the bargaining unit, with disciplinary action and termination if the employee did not increase her speed on the employee's truck route and by advising an employee that it would monitor her for 30 days, all because of the Union; and by denying an employee union representation during a meeting that she reasonably believed would result in disciplinary action, Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Svc., Inc., E&L Mail, Inc., and H&L Mail, Inc., a single employer, the respondent herein, violated Section 8(a)(1).

3. By discharging its employees John Pinkston, Bobby Marks, Howard Cranford and Clyde Evans, by transferring its employees Frank Cruz and Richard Paiz to lower paying routes, by reducing its employee Julio Gomez's route by one day each week, and by issuing written warnings and suspending its employee Fern Clark, Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Svc., Inc., E&L Mail, Inc., and H&L Mail, Inc., a single employer and the respondent herein, violated of Section 8(a)(1) and (3).

4. By unilaterally changing the hours and routes of the Dallas/Denver run; by unilaterally transferring drivers assigned to the Dallas/Denver route to the extra–board; by unilaterally laying off its Springfield drivers; by failing and refusing to bargain with the Union concerning the alteration in the hours and routes of the Dallas/Denver run; by unilaterally altering the hours and route of the Nuevo Laredo run; by failing and refusing to furnish information requested by the Union; by unilaterally altering its policy regarding drivers correcting their timecards and DOT logs; by unilaterally altering its disciplinary policy regarding DOT logs; and by unilaterally altering the random drug test practice for its employees; Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Svc., Inc., E&L Mail, Inc., and H&L Mail, Inc., a single employer and the respondent herein, violated Section 8(a)(1) and (5).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having engaged in unlawful conduct by discriminatorily discharging employees Pinkston, Marks, Cranford and Evans, it must offer them reinstatement to each of their former jobs, or, if one or more of those jobs no longer exists, to

[56] Unless otherwise stated the terms employee(s) or driver(s) refer to bargaining unit employees.

a substantially equivalent position; and by discriminatorily transferring its employees Cruz and Paiz to lower paying routes and by discriminatorily reducing its employee Gomez's pay, it must offer to restore each of them to his former job or, if that job not longer exists, to a substantially equivalent position; and by suspending its employee Clark, Respondent must make Pinkston, Marks, Cranford, Evans, Cruz, Paiz, Gomez and Clark, whole[57] for all loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in ***F. W. Woolworth Co.,*** 90 NLRB 289 (1950), plus interest as computed in ***New Horizons for the Retarded***, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[58]

ORDER

The Respondent, the Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Svc., Inc., E&L Mail, Inc., and H&L Mail, Inc., a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(i) Engaging in conduct in violation of section 8(a)(1) of the Act by threatening its employees with loss of employment, that the business would close, with loss of pay, with transfer to a lower paying job with a company not in the bargaining unit, to disciplinary action and termination if she did not increase her speed on the employee's truck route, and by advising an employee that it would monitor her for 30 days, because of the Union; and by denying an employee union representation during a meeting that she reasonably believed would result in disciplinary action.

(ii) Engaging in conduct in violation of section 8(a)(1) and (3) of the Act by discharging its employees including John Pinkston, Bobby Marks, Howard Cranford and Clyde Evans, by imposing more onerous working conditions by altering its disciplinary policy regarding DOT logs, by transferring its employees including Frank Cruz and Richard Paiz to lower paying routes, by reducing its employee routes, including Julio Gomez, by one day each week, and by issuing written warnings and suspending its employees including Fern Clark.

(iii) Engaging in conduct in violation of section 8(a)(1) and (5) of the Act by refusing to bargain in good faith with American Postal Workers Union, AFL–CIO, as exclusive collective bargaining representative of the employees in the bargaining unit specified herein, by unilaterally changing the hours and routes of the Dallas/Denver run; by unilaterally transferring drivers assigned to the Dallas/Denver route to the extra–board; by unilaterally laying off its Springfield drivers; by failing and refusing to bargain with the Union concerning the alteration in the hours and routes of the Dallas/Denver run; by unilaterally altering the hours and route of the Nuevo Laredo route; by failing and refusing to furnish information requested by the Union; by unilaterally altering its policy regarding drivers correcting their timecards and DOT logs; by unilaterally altering the disciplinary policy regarding DOT logs; and by unilaterally altering the random drug test practice for its employees.

(iv) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(i) Within 14 days from the date of this Order, offer full and immediate reinstatement, make whole for lost wages and benefits and remove from its files any reference to the unlawful discharges of, John Pinkston, Bobby Marks, Howard Cranford and Clyde Evans, the unlawful transfer Frank Cruz and Richard Paiz to lower paying routes, the unlawful reduction in the route of Julio Gomez by one day each week, and the unlawful written warnings and suspension its employee Fern Clark, and within 3 days thereafter notify Pinkston, Marks, Cranford, Evans, Cruz, Paiz, Gomez, and Clark in writing that this has been done and that the disciplinary actions will not be used against them in any way.

(ii) Within 14 days from the date of this Order, make whole for lost wages and benefits all other bargaining unit employees that suffered lost wages or benefits as a result of our unlawful actions in violation of section 8(a)(1) and (3) and section 8(a)(1) and (5).

(iii) Beginning within 14 days of a request from the Union, meet and bargain in good faith for a period of at least one year from the time it has remedied all the action found unlawful herein.

(iv) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(v) Within 14 days after service by the Region, post at its facilities in Dallas, Houston and San Antonio, Texas, copies of the attached notice marked "Appendix."[59] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or

[57] Respondent must reimburse Pinkston, Marks, Cranford, Evans, Cruz, Paiz, Gomez and Clark, for all extra federal and state income taxes that result from a lump sum payment of the award herein.

[58] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[59] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2000.

(vi) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with loss of employment because of their union activity.

WE WILL NOT threaten our employees that the business would close because of their union activity.

WE WILL NOT threaten our employees with loss of pay because of their union activities.

WE WILL NOT threaten our employees with transfer to a lower paying job because of their union activity.

WE WILL NOT threaten our employees with termination for not increasing her or his speed, because of their union activity.

WE WILL NOT deny employees union representation during interviews when the employee reasonably believes disciplinary action will result.

WE WILL NOT discharge, transfer to lower paying jobs, impose more onerous working conditions by altering our disciplinary policy regarding DOT logs, reduce our employees work, and warn or suspend, our employees because of their union activity.

WE WILL offer full and immediate reinstatement to John Pinkston, Bobby Marks, Howard Cranford and Clyde Evans, to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without loss of pay or benefits.

WE WILL rescind more onerous working conditions imposed on our drivers by altering our disciplinary policy regarding DOT logs and we will restore the former disciplinary policy regarding DOT logs.

WE WILL rescind the reduction in pay and work previously imposed on Julio Gomez because of his union activities and restore Gomez to his former job, or, if that job no longer exists, to a substantially equivalent position without loss of pay and benefits.

WE WILL rescind our transfer of Frank Cruz and Richard Paiz, and restore Cruz and Paiz to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions without loss of pay and benefits.

WE WILL rescind the warnings and suspension issued to Fern Clark, because of her union activities.

WE WILL make whole Pinkston, Marks, Cranford, Evans Gomez, Cruz, Paiz and Clark, and all other employees that suffered loss as a result of the unfair labor practices in violation of section 8(a)(3) and (5), for all loss wages and other benefits caused by our unlawful action against them.

WE WILL rescind, remove and no longer consider all records regarding the unlawful action against Pinkston, Marks, Cranford, Evans Gomez, Cruz, Paiz and Clark and we will notify each of them of that action, in writing.

WE WILL recognize and bargain with in good faith with American Postal Workers Union, AFL–CIO, the exclusive collective bargaining representative of our following described employees:

> Included: All permanent full–time and part–time truck drivers employed by Southern Mail Service, Inc., Byrd Trucking Co., Inc., S&B Stagelines, Inc., Alamo Mail Svc., Inc., E&L Mail, Inc., and H&L Mail, Inc.,[60] a Single Employer, who are assigned, stationed or dispatched from the Employers' terminals located in Dallas, San Antonio and Houston, Texas.
>
> Excluded: All other employees including professionals, technicals, mechanics, dispatchers, clericals, administrative employees, guards and supervisors as defined by the Act.

WE WILL NOT unilaterally alter the hours and routes of the Nuevo Laredo runs without negotiating in good faith with the Union; WE WILL rescind our unilateral alteration of hours and routes of the Nuevo Laredo runs and WE WILL restore those hours and routes as they existed before our unlawful action, until we have negotiated in good faith with the Union.

WE WILL NOT fail or refuse to furnish information requested by the Union which is relevant to the Union's exercise of its duties as representative of the above stated bargaining unit employees.

WE WILL NOT unilaterally alter the hours and routes on the Dallas/Denver run without first negotiating in good faith with the Union and WE WILL rescind our unilateral alteration of hours and routes of the Dallas/Denver runs and WE WILL restore those hours and routes as they existed before our unlawful action, until we have negotiated in good faith with the Union.

WE WILL NOT unilaterally transfer drivers from the Dallas/Denver route to the extra–board without first negotiating in

[60] The employer is sometimes referred to as Southern Mail, Byrd, S&B, Alamo, E&L and H&L.

good faith with the Union and WE WILL rescind our unilateral transfer of drivers from the Dallas/Denver route to the extra–board and restore those drivers to their positions as they existed before our unlawful action, until we have negotiated in good faith with the Union.

WE WILL NOT unilaterally lay off Springfield drivers without first negotiating in good faith with the Union; WE WILL rescind our lay offs of those drivers; WE WILL offer each of those drivers full and immediate reinstatement and WE WILL make each of those drivers whole for all lost wages and benefits.

WE WILL NOT unilaterally refuse to meet and bargain with the Union.

WE WILL NOT unilaterally alter our policy regarding drivers correcting their time cards and logs without negotiating in good faith with the Union; WE WILL rescind our unlawful changes and restore our policy regarding drivers correcting their timecards and logs as our policies existed before our unlawful action; and WE WILL NOT rely on any disciplinary action that occurred as a result of our unlawful change in timecard and log policy, for any reason, until we have bargained in good faith with the Union.

WE WILL NOT fail or refuse to bargain with the Union concerning the alteration in hours and route of the Dallas/Denver runs since September 29, 2000.

WE WILL NOT unilaterally alter our employee random drug test policy without first bargaining with the Union and WE WILL restore our drug testing policy as it existed before our unlawful action, until we have negotiated in good faith with the Union.

WE WILL recognize and bargain with in good faith with American Postal Workers Union, AFL–CIO, the exclusive collective bargaining representative of the unit employees from the time we have remedied our unlawful actions in violation of section 8(a)(1) and (5); for a minimum of one year.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights established by section 7 or the National Labor Relations Board.

SOUTHERN MAIL SERVICE, INC., BYRD TRUCKING CO., INC., S&B STAGELINES, INC., ALAMO MAIL SERVICE, INC., E&L MAIL, INC., AND H&L MAIL, INC., A SINGLE EMPLOYER